Exhibit 14

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

| | | |
|---|---|---|
| *In re:* | : | |
| | : | CHAPTER 11 |
| MARITIME COMMUNICATIONS/, | : | |
| LAND MOBILE LLC | : | CASE NO. 11-13463-NPO |
| Debtor. | : | |
| | : | |

**MOTION FOR A LIMITED STAY PENDING APPEAL**
**(Dkt. #s 973, 980, 999)**

Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC, Environmental LLC, Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, "SkyTel"),[1] creditors, objectors, and parties-in-interest[2] in the above-captioned bankruptcy case (the "Bankruptcy Case"), file this *Motion for a Limited Stay Pending Appeal* (the "Motion") under, *inter alia*, Rule 8005 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules" or "Rules"), requesting a limited stay pending SkyTel's appeal (the "Appeal")[3] of the *Order Confirming Plan of Reorganization* (the "Confirmation Order")[4] entered on or about January 11, 2013[5] by the Honorable David W. Houston, III, which, among other

[1] The SkyTel entities listed here are separate legal entities, all managed by Warren Havens, and for the purposes of the Bankruptcy Case and in related proceedings before the Federal Communications Commission, pursue certain common interests.

[2] *See e.g.* Claim No. 69; 11 U.S.C. § 1109; Dkt. #685; Dkt. #806.

[3] *See* Notice of Appeal, Dkt. #999.

[4] *See* Confirmation Order, Dkt. #s 973, 980, attached hereto as **Exhibit A**; *see also* the related bench opinion (the "Bench Opinion") issued on November 15, 2012, attached hereto as **Exhibit B**. Regarding the Bench Opinion, and the transcript of the two-day confirmation hearing (the "Confirmation Hearing") from which it came (the "Confirmation Hearing Transcript"), SkyTel has requested numerous corrections be made to that and other transcripts which have been designated as part of the record on appeal (including corrections necessitated by multiple instances of "indiscernible" testimony), but only three such corrections involve the Bench Opinion. *See e.g.* Letter to Veritext, a copy of which is attached hereto as **Exhibit C**. The correction process has taken somewhat longer than usual in part because it took longer than expected for SkyTel to obtain the audio files for the subject transcripts. In any event, the requested corrections have either been made or are in progress.

[5] The Confirmation Order was initially entered on January 11, 2013 as Dkt. # 973, but was missing the last two pages. The completed Confirmation Order was re-entered on January 15, 2013 as

things, confirmed the *First Amended Plan of Reorganization* (the "Plan")[6] filed in the Bankruptcy Case by the Debtor Maritime Communications/Land Mobile, LLC (the "Debtor" or "Maritime").[7] In support of its Motion, Skytel states as follows:

**INTRODUCTION**

1. Under the Communications Act of 1934 (the "FCA"), Congress has directed the Federal Communications Commission (the "FCC" or "Commission") to license wireless radio spectrum in a manner that furthers the public interest.[8] To that end, Congress has authorized the FCC to award spectrum licenses to qualified candidates "based on a competitive bidding process."[9] The Debtor here is a company which allegedly obtained certain geographic spectrum licenses through such a process (at an auction),[10] and other incumbent or site-based spectrum licenses through a sale/purchase.[11]

---

Dkt. # 980 (though the date of re-entry is shown as January 11, 2013 on the face of the Pacer docket). Out of an abundance of caution, both docket numbers are referred to in this Motion.

[6] Plan, Dkt. #669.

[7] The Debtor also filed a *Third Amended Disclosure Statement* (the "Disclosure Statement," Dkt. #668) in support of the Plan. The proposal of Choctaw Telecommunications, LLC (sometimes referred to herein, collectively with the entities/people related to Choctaw Telecommunications, LLC, as "Choctaw") (the proposal is referred to as the "Choctaw Proposal"), and the proposal of Council Tree Investors ("CTI") (referred to as the "CTI Proposal"), are both attached to the Disclosure Statement as exhibits. *See* Dkt. #668, at Exhs. C and D thereto.

[8] *See e.g. Thacker v. FCC (In re Magnacom Wireless, LLC)*, 503 F.3d 984, 987 (9th Cir. 2007); 47 U.S.C. § 307.

[9] *See Thacker*, 503 F.3d at 987.

[10] *See generally* Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (FCC 11-64), *In re Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd. 6520, 6523–24 at ¶¶ 9, 12, 13 (2011) (the "HDO"), a redacted copy of which is attached hereto as **Exhibit F**. *See also* **Exhibit G** hereto, excerpts from Transcript of Deposition of John Reardon Dated September 28, 2012 (the "Reardon FCC Deposition Transcript"), at pp. 17:10-11, 183:12-19, 242:16-18; *see also* **Exhibit H** hereto, excerpts from Vol. I of the "uncorrected" Confirmation Hearing Transcript, at pp. 55:10-17, 82:19-23, 103:5-13.

[11] *See e.g.* Reardon FCC Deposition Transcript (Exhibit G), at pp. 17:11-12, 72:1-5, 76:6-14, 81:4-11, 183:12-19; *see also* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 52:18-25, 53:1-9, 103:5-13.

2. However, consistent with its duty to promote the public convenience, interest, and necessity,[12] the FCC has implemented a standard policy (the "*Jefferson Radio* Policy") of revoking or suspending license-assignment rights of radio spectrum licensees who misrepresent their qualifications to the Commission or otherwise exhibit character defects.[13] This is important because the FCC has called this Debtor's qualifications into question. Indeed, the FCC initiated proceedings against the Debtor to determine, among other things, whether the Debtor "is qualified to be and to remain a Commission licensee," whether the Commission should revoke any or all of the Debtor's alleged licenses, and whether certain of the Debtor's alleged licenses have cancelled or terminated automatically for lack of construction or permanent discontinuance of operation.[14]

3. In the face of these FCC proceedings, the Debtor filed the Bankruptcy Case and proposed a Plan under which the Debtor intends to attempt to seek FCC approval to transfer certain FCC spectrum licenses which the Debtor claims to own (the "Licenses") to a third-party pursuant to an extraordinary exception to the *Jefferson Radio* Policy -- sometimes called *Second Thursday* (an alleged policy or doctrine) -- which has been applied under certain very limited circumstances.[15]

4. SkyTel objected to confirmation of the Plan, arguing, among many other things, that the Plan is unfeasible because of the *Jefferson Radio* Policy and the inapplicability of *Second Thursday* in this case, and because, even if *Second Thursday* were applicable, the

[12] *See e.g.* 47 U.S.C. §307 ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.").

[13] *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). *E.g. In re Wallerstein*, 1 F.C.C.2d 91 (FCC 1965); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). *See also* HDO, at ¶ 27, nn. 56, 57.

[14] *See* HDO, at ¶¶ 1-2, ¶ 61, and p. 28.

[15] *See e.g.* Plan, Dkt. #669, at pp. 10, 11, 17, 18; *see also* Choctaw Proposal, Dkt. #668-5, at pp. 3-4, 8-10; *see* Disclosure Statement, Dkt. #668, at p. 19.

Licenses cannot in any event be transferred for a variety of reasons, largely based on federal communications law and/or federal anti-trust law.[16] Regardless, the Bankruptcy Court confirmed the Debtor's Plan, and SkyTel timely appealed.[17]

5. SkyTel now files this Motion under Bankruptcy Rule 8005, seeking a limited, conditional stay (the "Limited Stay") of the Confirmation Order without bond. In the alternative, if this Court in its discretion requires a bond, SkyTel requests a limited bond as discussed below. Under Rule 8005, the Limited Stay is warranted because, among other things:

a. SkyTel's Appeal presents a substantial case on the merits;

b. absent a stay pending appeal, SkyTel will be irreparably harmed if, among other possible things, a future appellate court determines the Appeal is moot;

c. because of the distinct nature of this Bankruptcy Case, the nature of the assets involved, and the terms of the Limited Stay, the Limited Stay will not substantially harm others pending Appeal; and

d. granting the Limited Stay will serve the public interest.

Further, for the same reasons stated above, among other possible reasons, a bond is not necessary pending Appeal.

## FACTS AND BACKGROUND

6. For a detailed overview of the facts and background relevant to this Motion and/or helpful to an understanding of the context in which this Motion is brought, see the "Facts and Background" section of SkyTel's *Motion and Request for Certification of Direct Appeal to the United States Court of Appeals for the Fifth Circuit* (the "Request for Certification," Dkt. #1044), filed in the Bankruptcy case on March 12, 2013. The Facts and Background section of

[16] *See generally* SkyTel's *Objection to Confirmation of the Debtor's First Amended Plan of Reorganization* ( "SkyTel's Objection"), Dkt. #806, at pp. 32-54.

[17] *See* Notice of Appeal, Dkt. #999.

the Request for Certification is hereby incorporated herein by reference, along with the supporting exhibits cited to therein.[18]

**ARGUMENT**

## I. The Scope of the Limited Stay

7. SkyTel requests that this Court issue a Limited Stay of the Confirmation Order until the earlier of: (1) a final non-appealable appellate decision ("Final Appellate Decision");[19] or (2) FCC approval of the assignment of the Licenses, to Choctaw or otherwise. SkyTel proposes that the following actions, contemplated by the Plan and/or Confirmation Order, would be *excluded* from the scope of the requested Limited Stay:[20]

a. Efforts by the Debtor or others to seek FCC approval of the assignment of the Licenses from the Debtor to Choctaw or otherwise;[21]

b. Choctaw and Holdings using "their best efforts to obtain the [Licenses] from [the Debtor] and to obtain approval from the FCC for the same;"[22]

c. Efforts by the Debtor (and, if applicable, Choctaw) to enter into agreements to assign Licenses, upon and subject to approval by the FCC;[23]

d. the Debtor paying "any and all fees currently due and outstanding to the [United States Trustee (the "UST")]", "timely pay[ing] to the UST any and all post-confirmation quarterly fees as required by 28 U.S.C. § 1930(a)(6) until such time as this case is converted, dismissed or closed by the Court," and "timely submit[ting] to the UST post-confirmation Monthly Operating Reports in the

[18] *See* Request for Certification, at pp. 6-16. Capitalized terms used but not expressly defined herein shall have the meaning given them in the Request for Certification, unless the context dictates otherwise. For the sake of uniformity, the exhibits to the Request for Certification are lettered consistently with the exhibits to the Motion; as a result, there is no Exhibit D or E to the Motion.

[19] A Final Appellate Decision being defined as the point at which SkyTel has exhausted all of its available appellate rights in connection with the Confirmation Order and appeal thereof.

[20] With SkyTel reserving all rights it may have to object to any such actions if it deems appropriate, including but not limited to all rights in and in connection with the FCC proceedings and New Jersey Litigation. *See e.g.* Confirmation Order, Dkt. #973, at pp. 11-12.

[21] *See e.g.* Plan, Dkt. #669, at p. 10; *see* Confirmation Order, Dkt. #973, at p. 8.

[22] *See* Confirmation Order, Dkt. #973, at p. 8.

[23] *See e.g.* Confirmation Order, Dkt. #973, at p. 8.

format prescribed by the UST until such time as this case is converted, dismissed or closed by the Court;"[24]

e. Professional persons ("Bankruptcy Professionals")[25] filing applications for compensation, and payments being made in connection with such applications as contemplated by and provided for in the Plan and Confirmation Order, upon Court approval;[26]

f. Payments, upon Court approval and any other necessary approvals, of allowed Class 8 Administrative Claims (as that term is defined in the Plan[27]) or other approved amounts to: (a) Bankruptcy Professionals; (b) parties to the Confirmation Order and Confirmation Order Appeal who are before the Court (including those parties' attorneys); and (c) the Liquidating Agent (assuming such payments are otherwise contemplated by and provided for in the Plan and Confirmation Order);

g. Payment or accrual of the following, if and when authorized under the Plan and Confirmation Order: (a) the Choctaw Investors Tax Accrual(s) to the Choctaw Investors; and (b) the Monthly Accruals to Choctaw or the Choctaw Investors; and

h. The assumption of executory contracts and unexpired leases by the Debtor, and the assignment thereof to Choctaw as of the Effective Date (as that term is defined in the Plan and Confirmation Order – hereafter, the "Effective Date"), as provided by the Plan and Confirmation Order.[28]

The following, however, *would be stayed* by the Limited Stay being requested by SkyTel herein:

i. Payments of Class 8 Administrative Claims (as that term is defined in the Plan[29]), but excluding properly approved payments (administrative or otherwise) to: (a) Bankruptcy Professionals; (b) parties to the Confirmation Order and Confirmation Order Appeal who are before the Court (including those parties' attorneys); and (c) the Liquidating Agent;[30]

---

[24] *See* Confirmation Order, Dkt. #973, at p. 5.

[25] Bankruptcy Professionals being defined in this context to include, but not necessarily to be limited to: (a) counsel or special counsel for the Debtor (e.g., Craig M. Geno, Robert W. Mauriello, Jr., Robert J. Keller, Dennis C. Brown); (b) counsel for the Official Committee of Unsecured Creditors; and (c) counsel for the Liquidating Agent.

[26] *See e.g.* Confirmation Order, Dkt. #973, at p. 10.

[27] *See* Plan, Dkt. #669, at p. 2.

[28] *See e.g.* Plan, Dkt. #669, at p. 23.

[29] *See* Plan, Dkt. #669, at p. 2.

[30] To date, no party has sought approval of any payment which would be stayed by this portion of the requested Limited Stay.

j. Payments called for under the Plan in connection with Class 6 Priority Tax Claims;[31]

k. Any sale, transfer, or assignment of Licenses to Choctaw Telecommunications, LLC, to Choctaw Holdings, LLC, or to any other person or entity, unless and until the FCC approves any such sale, transfer, or assignment;

l. The payment of any cure amounts in connection with asset purchase agreements (or other executory contracts or unexpired leases) assumed, or assumed and assigned, pursuant to the Plan or pursuant to orders entered prior to Plan confirmation, but excluding (a) any such payments which can only be made *after* the FCC has approved the underlying transaction and after such underlying transaction has been consummated, and (b) any such properly approved payments to parties to the Confirmation Order and Confirmation Order Appeal who are before the Court (including those parties' attorneys);[32] and

m. Any other actions, items, issues, or payments, if any, not expressly excluded from the Limited Stay requested herein.

Further, in connection with the Limited Stay requested herein, SkyTel requests this Court to Order the Debtor and Choctaw to give written notice (the "Notice") of the pending FCC Proceedings, the New Jersey Litigation, and this Appeal, and of the potential effects thereof on the Licenses, to any third-parties not party to the Confirmation Order and Confirmation Order Appeal with whom the Debtor and Choctaw do business that is contemplated under or connected with the Plan or Confirmation Order. The purpose of the Notice would be to limit potential third-party reliance, if any, on the Confirmation Order during the course of the Appeal. Further, SkyTel requests that the Notice make clear that transactions entered into by third-parties with the

[31] The Plan provides that the Debtor "is liable to various taxing authorities for ad valorem property taxes," and that such "Class 6 Priority Tax Claims" shall be paid by Choctaw annually over three (3) years with the first payment due a year after the Effective Date. *See* Plan, Dkt. #669, at p. 11. Under the Plan and Confirmation Order, one of the conditions precedent to the occurrence of the Effective Date is FCC approval of the transfer of the Licenses to Choctaw. *See id*., at p. 24; *see also* Confirmation Order, at p. 7. Thus, as discussed in more detail below, it appears that no Class 6 Priority Tax Claims are to be paid during the pendency of the requested Limited Stay, given that it would expire upon FCC approval of the assignment of the Licenses. Nevertheless, item (j) is included in the scope of the Limited Stay, perhaps out of an abundance of caution.

[32] *See* Plan, Dkt. #669, at p. 23 (discussing "Cure of Defaults of Assumed Executory Contracts"); *see also, e.g*., Dkt. #954.

Debtor or Choctaw are, consistent with the Plan and Confirmation Order, subject to and contingent on ultimate approval by the FCC to the extent the transactions involve the assignment/transfer/sale of Licenses.

8. The Limited Stay and related Notice requirements requested herein are intended to achieve two main goals – i.e., to limit potential harm to the subject parties (if any) by allowing the Debtor/Choctaw to move forward with seeking the FCC approval(s) contemplated by the Plan, while, at the same time, helping preserve SkyTel's right to obtain meaningful appellate review of the Confirmation Order by limiting the possibility that a future appellate court might determine the Appeal is moot before the earlier of (1) a Final Appellate Decision, or (2) FCC approval of the assignment of the Licenses, to Choctaw or otherwise. By implementing the requested Limited Stay, the only possible "adverse" consequence to the Debtor/Choctaw are the natural results "of any ordinary appeal -- one side goes away disappointed."[33] In addition, any such adverse appellate consequences are foreseeable to sophisticated investors and plan proponents such as the Debtor and Choctaw, as well as to Bankruptcy Professionals and the parties to the Confirmation Order and Appeal.[34]

## II. The Limited Stay SkyTel Requests is Warranted Under Rule 8005

9. Under Bankruptcy Rule 8005, this Court may stay a confirmation order pending appeal.[35] Rule 8005 further provides that "the bankruptcy judge may . . . make any *other* appropriate order during the pendency of an appeal on such terms as will protect the rights of *all* parties in interest."[36] This includes forgoing the usual bond requirement where "little or no

[33] *See Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 244 (5th Cir. 2009).
[34] *See id*.
[35] Fed. R. Bankr. P. 8001.
[36] Fed. R. Bankr. P. 8001.

damage will be incurred as a result of the stay . . . ."[37] Here, two competing interests exist: SkyTel's right to meaningful appellate review and potential harm to others pending appeal. As such, SkyTel has proposed herein the Limited Stay, which is intended to significantly limit, and likely eliminate, potential harm to others, while also helping preserve SkyTel's appellate rights. As the Fifth Circuit has noted, courts may tailor (or forgo) bonds and expedite appeals to meet these twin goals -- indeed, "as with all facets of bankruptcy practice, myriad possibilities exist" and "substantial legal issues can and ought to be preserved for review."[38]

10. When presented with a motion to stay under Rule 8005, a court generally employs the same four-factor test required for issuance of a preliminary injunction.[39] Under that test, the movant must show: (1) a likelihood of success on the merits (or really, as discussed below, a substantial case on the merits here); (2) irreparable injury absent a stay; (3) that granting the stay will not substantially harm the other parties; and (4) that granting the stay will serve the public interest.[40] The Fifth Circuit does not, however, "apply these factors in a rigid mechanical fashion."[41] Instead, the test is a "balance of equities."[42] Here, each factor and the equities weigh in SkyTel's favor.

***a. Likelihood of success on the merits / Substantial case on the merits***

11. Under the first factor, the movant "need not always show a 'probability' of success on the merits; instead the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e., the balancing

[37] *In re Sphere Holding Corp.*, 162 B.R. 639, 654 (E.D.N.Y. 1994).
[38] *In re Pacific Lumber Co.*, 584 F.3d at 243.
[39] *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).
[40] *Id*.
[41] *Reading & Bates Petroleum Co. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir. 1994).
[42] *See Ruiz*, 650 F.2d at 565-566.

of the four factors in the above four-factor test] weighs heavily in favor of granting the stay."[43] In this regard, the Fifth Circuit has held that "[t]he court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to [the] movant's view of the merits."[44] This is so, because "[i]f a movant were required in every case to establish that the appeal would probably be successful, [Rule 8005] would not require as it does a prior presentation to the [bankruptcy] judge whose order is being appealed. That judge has already decided the merits of the legal issue."[45] Here, including for the reasons discussed below[46], SkyTel's Appeal presents a substantial case on the merits as to *every* issue raised on appeal (though SkyTel is *not* required to make such a showing as to *every* issue; one issue is enough[47]). Further, serious legal questions are involved in the Appeal, including for the reasons discussed on pp. 23-31 of SkyTel's Request for Certification.

[43] *Arnold v. Garlock, Inc.*, 278 F.3d 426, 438 (5th Cir. 2001) (citing *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982)).

[44] *Ruiz*, 650 F.2d at 565 (citing *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

[45] *Ruis*, 650 F.2d at 565.

[46] SkyTel reserves the right to include additional reasons and arguments in support of the issues on Appeal in its Appellant Brief

[47] *See e.g. Bossart v. Havis (In re Bossart)*, 2008 U.S. Dist. 17473, at *3-4 (S.D. Tex. March 6, 2008) ("In this case, Appellants identify a number of issues on appeal. Although the Court cannot find a likelihood of success on most of those issues, Appellants present a potentially valid argument regarding the Bankruptcy Court's decision to award the Trustee the full amount deposited in the Court Registry . . . ." Further, "the public interest favors having legal matters decided on the merits. Accordingly, having considered the relevant factors, it is hereby ordered that Appellants' Motion for Stay Pending Appeal is granted.").

(i) Whether the Bankruptcy Court erred when it concluded that the Debtor's Plan satisfies the "feasibility" requirements of 11 U.S.C. § 1129(a)(11)[48]

12. As its first issue,[49] SkyTel argues that the Court erred by concluding that the Debtor's Plan was feasible under § 1129(a)(11). At the very least, SkyTel has presented a substantial case on the merits as to this issue.

13. As a condition to confirmation, § 1129(a)(11) requires a bankruptcy court to find that a debtor's plan is "feasible" -- i.e., that plan confirmation is not likely to be followed by liquidation or further reorganization unless such liquidation or reorganization is proposed in the plan.[50] The purpose of this provision is to "prevent confirmation of visionary schemes which promise creditors more under a proposed plan than the debtor can possibly attain after confirmation."[51] Although a debtor need not guarantee the success of its plan, it must provide "reasonable assurance" that the plan can be effectuated.[52] As with the other elements of § 1129(a), the Debtor must establish the feasibility of its plan by a preponderance of the evidence.[53] Here, however, the Debtor failed to meet its burden and the Court erred in finding that a "reasonably assurance" existed. Instead, the Plan involves an impermissible, and unconfirmable, "visionary scheme" and nothing more.

---

[48] *See* Appellant's Designation of Items to be Included in the Record on Appeal and Statement of the Issues to be Presented (the "Designation/Statement"), Dkt. # 1019, at p. 11, for a complete list of the issues on appeal.

[49] SkyTel's objection as to feasibility, and its arguments in support thereof, are set forth more fully in SkyTel's Objection, Dkt. #806, at pp. 32-48, and are supplemented herein with, for example, cites to the Confirmation Hearing record.

[50] 11 U.S.C. § 1129(a)(11).

[51] *In re Trails End Lodge, Inc*., 54 B.R. 898, 903-904 (Bankr. D. Vt. 1985); *In re Sea Garden Motel and Apartments*, 195 B.R. 294, 304 (D.N.J. 1996).

[52] *Kane v. Johns-Manville Corp*., 843 F.2d 636, 649 (2nd Cir. 1988); *In re Atrium Hight Point Ltd. Partnership*, 189 B.R. 599, 609 (Bankr. M.D.N.C. 1995); *In re Orlando Investors, L.P*., 103 B.R. 593, 600 (Bankr. E.D. Pa. 1989); *In re Kemp*, 134 B.R. 413, 416 (Bankr. E.D. Cal. 1991).

[53] *Matter of Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993); *In re Locke Mill Partners*, 178 B.R. 697, 700 (Bankr. M.D.N.C. 1995).

14. The success of the Plan essentially, and ultimately, depends on the FCC approving the assignment of the Licenses to Choctaw under *Second Thursday*.[54] But, as discussed in greater detail in the Objection and in the Request for Certification, there are many problems with the Plan's feasibility, especially when considering feasibility in light of applicable federal communications law and bankruptcy law, as well as federal anti-trust law.

15. As an initial matter, the Debtor's character and qualifications as a License holder have been called into question by the FCC. Indeed, in the HDO, the FCC determined, among other things, that there are "substantial and material questions of fact" as to whether the Debtor:

> (i) violated the designated entity rules and received a credit on its obligations to the United States Treasury of approximately $2.5 million to which it was not entitled;
>
> (ii) repeatedly made misrepresentations to and lacked candor with the [FCC] in connection with its participation in [Auction 61] and the claimed bidding credit;
>
> (iii) failed to maintain the continuing accuracy and completeness of information furnished in its still pending long-form application; and
>
> (iv) purports to hold authorizations that have cancelled automatically for lack of construction or permanent discontinuance of operation.[55]

16. If the FCC were to ultimately find (whether in the Show Cause Hearing or otherwise) that the Debtor is unqualified to be and remain an FCC licensee, the FCC would very likely revoke all of the Licenses and the Debtor would have nothing to transfer to Choctaw to effectuate the Plan.[56] If the FCC finds, in connection with Issue G, that the Site-Based Licenses have terminated automatically by operation of law, then those licenses would be gone without any further affirmative FCC action required, and they could not be transferred to Choctaw to

[54] *See e.g.* Plan, Dkt. #669, at pp. 10, 11, 17, 18; *see also* Choctaw Proposal, Dkt. #668-5, at pp. 3-4; *see* Disclosure Statement, Dkt. #668, at p. 19.

[55] *See e.g.* HDO, at ¶ 2.

[56] *See e.g.* HDO, at ¶¶ 1, 2. *E.g. Jefferson Radio Co.*, 340 F.2d at 781.

effectuate the Plan.[57] Further, if the FCC resolves SkyTel's pending Application for Review in SkyTel's favor, and finds the Geographic Licenses to be void ab initio, then those Licenses could not be transferred to Choctaw to effectuate the Plan (rather, in SkyTel's view, they would have to be awarded to SkyTel[58]). Finally, if the New Jersey Litigation -- which is based on federal anti-trust law -- is resolved in SkyTel's favor, it could potentially result in, among other things, the revocation of all the Licenses by the District Court under 47 U.S.C. § 313, with no FCC action or consent required.[59] If that occurs, there would be no Geographic Licenses to be transferred to Choctaw to effectuate the Plan.

17. The Debtor and Choctaw contended that the Plan was feasible because of *Second Thursday*,[60] despite the FCC's standard *Jefferson Radio* Policy[61] and despite the numerous other feasibility problems which have been highlighted by SkyTel.

18. However, *Second Thursday* is actually a narrow and extraordinary *exception* to the FCC's standard revocation policy:

> Despite the general rule that an assignment of license will not be authorized during the pendency of a hearing involving the character qualifications of a licensee, the Commission will permit such upon a showing that alleged wrongdoers will derive no benefit, either directly or indirectly, from the sale or will derive only minor benefit which is outweighed by the equities in favor of innocent creditors.[62]

Moreover, "[a]pplication of *Second Thursday* requires an ad hoc balancing of the possible injury to regulatory authority that might flow from wrongdoers' realization of benefit against the public

---

[57] *See e.g.* Request for Certifications, at ¶ 36 (for a more detailed discussion of Issue G and related matters).

[58] *See e.g.* Dkt. #668-10, p. 3.

[59] *See* 47 U.S.C. § 313.

[60] *See e.g.* Disclosure Statement, Dkt. #668, at p. 19; Plan, Dkt. #669, at pp. 16-19, 28-29, 35.

[61] *Jefferson Radio Co.*, 340 F.2d at 781.

[62] *LaRose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974) (citing *In re Shell Broadcasting, Inc.*, 38 F.C.C.2d 929, 931 (1973)).

interest in innocent creditors' recovery from the sales and assignment of the license to a qualified party."[63]

19. And in any event, SkyTel contended at the Confirmation Hearing, and contends on Appeal: (a) that the Debtor and Choctaw will, in light of applicable communications, bankruptcy, and anti-trust law, face significant, material hurdles in attempting to obtain *Second Thursday* relief;[64] and (b) that even if the Debtor and Choctaw could otherwise qualify for *Second Thursday* relief, that would, under applicable communications, bankruptcy, and anti-trust law, be insufficient -- for the reasons discussed above and in SkyTel's Objection[65] -- to allow the Licenses to be transferred; therefore, effectuation of the Plan is far from "reasonably assured" and the Plan would remain unfeasible.

20. Regarding *Second Thursday*, it does not apply to this case because, among other reasons: (a) the Debtor entered bankruptcy for the primary purpose of escaping FCC regulations and obtaining *Second Thursday* relief;[66] (b) an alleged "wrongdoer" (Donald DePriest) will receive at least an indirect benefit under the Plan by virtue of being released from multiple personal guarantees;[67] (c) the proposed transferee (Choctaw) is connected with the Debtor and

---

[63] *LaRose*, 494 F.2d at 1149.

[64] *See e.g.* SkyTel's Objection, Dkt. #806, at pp. 32-37; *see also* SkyTel's Insert into Disclosure Statement, Dkt. #668-10.

[65] *See e.g.* SkyTel's Objection, Dkt. #806, at pp. 37-41; *see also* SkyTel's Insert into Disclosure Statement, Dkt. #668-10.

[66] *See* SkyTel's Objection, Dkt. #806 at p. 51 n. 223.

[67] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 127-129 (Donald DePriest executed multiple personal guarantees of debts of the Debtor, which were entered into evidence under seal at the Confirmation Hearing as SkyTel Exhibit 1); *see* HDO, at p. 3 (identifying Donald DePriest as a potential wrongdoer); *see* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 138-141 (expert opining that *Second Thursday* not applicable because of, *inter alia*, guarantees); *see In re Family Broadcasting, Inc*., 25 FCC Rcd 7591,7598 (2010) (considering personal guarantees in *Second Thursday* analysis); *In re Application of Capital City Commc'ns, Inc*., 33 F.C.C.2d 703, 711 (1972) ("In our view, of particular and dispositive significance is the fact that stockholders charged with wrongdoing will be relieved of liability as guarantors on substantial obligations of [the debtor]." Therefore, "the principals of [the debtor] who are alleged to have engaged in wrongdoing will be relieved of their liability . . . . which represents over 20% of the proposed purchase price [and] is far more than a 'minor' benefit. We expressly

has been associated with the Debtor's operations;[68] (d) Choctaw is not an "innocent" creditor in that it had knowledge of the Debtor's impending troubles before the FCC;[69] and (e) Choctaw stands to gain a potentially huge windfall in the event it obtains and sells the spectrum for more than the amount of the Debtor's debts.[70]

21. In addition, even if *Second Thursday* relief were somehow obtained, there are significant and material hurdles to any transfer of the Licenses pursuant to the Plan which exist independent of the revocation portion of the Show Cause Hearing and which cannot be resolved by *Second Thursday* (e.g., the Application for Review, Issue G, the New Jersey Litigation, etc.). Accordingly, there would remain substantial feasibility problems with the Plan.

22. Further, the Plan is not feasible, and its effectuation is far from reasonably assured, because it is reliant on the occurrence of far too many contingencies outside the control of the Debtor, and is therefore impermissibly speculative and risky. Several of these contingencies are discussed, or at least alluded to, above -- e.g., the Plan's reliance on the FCC granting post-confirmation *Second Thursday* relief (i.e., reliance on the decision of a third party post-confirmation), and whether Choctaw would, in the event it ultimately obtains the Licenses, be able to market and sell the Licenses not already the subject of approved asset purchase agreements ("APAs") in order to fund the Plan payments (i.e., reliance on speculative post-confirmation sales).

---

held in Second Thursday, where it appeared that alleged wrongdoers would receive direct and indirect benefits amounting to approximately 23% of the purchase price of the broadcast facilities involved therein, that the public interest would not be served by allowing the principals thereof 'to receive so large a share of the proceeds of the broadcast facilities until a hearing is held and they are absolved of any wrong-doing'. A like conclusion must be reached here since we find no substantial equities in favor of innocent creditors which outweigh the benefits to alleged wrongdoers.")

[68] *See* Choctaw Proposal, Dkt. #668-5, at pp. 1-3; *see* CTI Proposal, Dkt. #688-8, at pp. 22-23.

[69] *See e.g.* Confirmation Hearing Transcript, Vol. II (Exhibit J), at pp. 123-131.

[70] In this regard, SkyTel is not aware of a single case in which the FCC has applied *Second Thursday* relief to a group of FCC licenses whose value exceeds the value of the FCC determined "innocent" debt.

23. There are numerous other such contingencies. To name a few -- (a) how long the *Second Thursday* process could possibly take; (b) how long it would take Choctaw to market and sell the non-APA Licenses (assuming they can); (c) whether Choctaw will abandon the *Second Thursday* process and/or marketing and sales efforts; (d) what happens if that happens; (e) whether and when funding for the *Second Thursday* process and/or the marketing and sales efforts, and any other obligations under the Plan, will dry up; (f) what happens if that happens; and (g) whether the APA counter-parties can and will go to closing in the face of SkyTel's other challenges to the Licenses (discussed above) and/or any SkyTel appeals.

24. In addition, the Plan is not feasible, and its effectuation is far from reasonably assured, because it is impermissibly open-ended and does not impose reasonable time limits. There is no reasonable time limit imposed on obtaining *Second Thursday* relief. There is no reasonable time limit imposed on the closing of the APAs or the marketing and sale of the remaining assets (in the event the FCC approves the Licenses being transferred to Choctaw). Perhaps more importantly, in the event Choctaw unilaterally decides to abandon marketing and selling efforts (which, under the Plan, they have a right to do), there is no clear picture of what happens then beyond the Debtor saying it will try to market and sell those Licenses. Does the Plan proceed, completely open-ended, and without clearly defined obligations on the part of the Debtor, for an undetermined period until the end of time? That is how the Plan reads, and that renders the Plan unconfirmable on feasibility grounds for at least two reasons -- (a) it is far too speculative; and (b) the Debtor has not established by "concrete evidence" that there will be sufficient cash flow, in the event this scenario occurs, to fund and maintain all operations and obligations under the Plan.[71]

[71] *S&P, Inc. v. Pfeifer*, 189 B.R. 173, 178 (N.D. Ind. 1995); *In re Crosscreek Apartments*, 213 B.R. 521 (Bankr. E.D. Tenn. 1997).

25. Courts have repeatedly denied plan confirmation on feasibility grounds in the face of speculative and risky contingencies similar to those discussed above, which render plan effectuation far from reasonably assured.[72]

26. Moreover, the risky and contingent nature of the Debtor's Plan was noted several times at the Confirmation Hearing. For example, during opening arguments, the Debtor's counsel stated that:

> the [D]ebtor has a number of contracts for sale of its spectrum . . . [and] those will not close until the FCC grants the [D]ebtor['s] *Second Thursday* application and coverage or some other event happens . . . so that the [D]ebtor is able to sell its licenses and Choctaw is able to sell and market those and consummate existing transactions and to seek other transactions as well. *And that is a risk. It's been a risk since the case was filed. It's no secret.*[73]

---

[72] *See e.g. Holmes v. United States (In re Holmes)*, 301 B.R. 911, 915 (Bankr. M.D. Ga. 2003) (Court denied plan confirmation on feasibility grounds where the debtor would not be able to perform his obligations under the plan unless the IRS were to agree to accept the debtor's offer to compromise his federal income tax obligations, and where it was uncertain whether the IRS would so agree); *In re Las Vegas Monorail Co*., 462 B.R. 795, 800-801 (Bankr. D. Nev. 2011) (Court denied plan confirmation on feasibility grounds where the plan's success was contingent on an "improbably chain of events" largely outside of the debtor's control); *In re Walker*, 165 B.R. 994, 1005 (E.D. Va. 1994) (Court denied plan confirmation on feasibility grounds where the plan's success was contingent in part on future sales of property which the debtor could not show were likely to occur); *In re Hoffman*, 52 B.R. 212, 215 (Bankr. D.N.D. 1985) (same); *In re Christian Faith Assembly*, 402 B.R. 794, 800 (Bankr. N.D. Ohio 2009) (Court denied plan confirmation on feasibility grounds where the debtor proposed to fund its plan through the operation of a child care facility, but the debtor's ability to operate such a facility was contingent on the debtor obtaining, post-confirmation, the necessary licenses and permits from the appropriate regulatory authorities); *In re Yates Dev*., 258 B.R. 36 (Bankr. M.D. Fla. 2000) (Court denied plan confirmation on feasibility grounds where effectuation of the plan relied on post-confirmation sale of property which would not occur unless and until the debtor obtained a favorable ruling from an appellate court in a pending appeal); *In re Southland Invs., Inc*., 2009 Bankr. LEXIS 1889, 11-13 (Bankr. E.D. Tenn. July 2, 2009) (Court denied plan confirmation on feasibility grounds where post-confirmation income and funding sources were not sufficiently definite and thus speculative); *In re Ralph C. Tyler, P.E., P.S., Inc*., 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) ("The Plan also provides for financing from outside sources. The Plan, however, does not indicate that there is *firm* financing in place and no evidence of any *commitment* to such financing has been provided to the Court. At the point of confirmation, this source of funding must be shown to be *firm* as it goes directly to feasibility. Without evidence of a *firm* commitment of financing, this Plan does not meet the feasibility requirement.") (citations omitted) (emphasis added); *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 489-491 (Bankr. S.D. Ohio 2011) (noting that, at confirmation, the Debtors must show by a preponderance of the evidence that they *can* fund the plan, not that they can obtain an opportunity to do so).

[73] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 27:18-25, 28: 1-3 (emphasis added).

Further, while testifying on the Debtor's behalf, John Reardon noted the same regarding the application of *Second Thursday*: "this is a situation where there's, in my mind, *a great degree of risk. There's certainly uncertainty*."[74] The FCC's counsel also presented "a number of risk factors connected to this particular potential *Second Thursday* application,"[75] which included the possibility of Choctaw receiving a windfall, the potential direct/indirect benefit to Don DePriest on account of his numerous personal guarantees, and whether the Licenses terminated under Issue G regardless of any *Second Thursday* application.[76] Additionally, during closing argument, the Debtor's counsel reiterated that "the [D]ebtor has no choice but to pursue *Second Thursday* treatment before the FCC. We *hope for the best. There is a risk there, but it's an assumable risk*."[77]

27. The test for feasibility under § 1129(a)(11), however, is not whether a debtor and others are willing to "assume" a "great degree of risk" involved with a proposed plan.[78] Instead,

---

[74] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 92: 25, 93: 1 (emphasis added). In addition, John Reardon, as the Debtor's 30(b)(6) designee, testified to the speculative and "hypothetical" nature of the Plan at a deposition taken on November 3, 2012: "But if the debtor was to convoy [sic] the licenses to . . . Choctaw and then the FCC was to say, we don't agree with the *Second Thursday*, we won't approve the *Second Thursday*, then I guess [the licenses] would go back to the debtor, and the debtor at that point would probably go through the show cause hearing, but it is also possible that the FCC could revoke the licenses. It is possible that the FCC could decide to grant under [Footnote 7 to the HDO], a number of the pending transactions and leave that as a path forward. I mean, it is also possible that another buyer, you know, maybe if it is Choctaw or Council Tree or somebody else could amend or correct their -- whatever is the deficiency in their plan in terms of *Second Thursday* and represent that -- is that a word? Present it again. So I guess it's kind of hypothetical. It might depend on what reasons why the FCC might say no to a *Second Thursday*. Like, for example, if they were to say, no, because this one owner, you know, or no, because of this or that, maybe they'd give it a chance to amend or approve, I don't know. It's kind of hypothetical." *See* **Exhibit K** hereto, excerpts from Transcript of Deposition of John Reardon Dated November 3, 2012, at pp. 141-142, and pp. 6-10.

[75] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp.169-171.

[76] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp.169-171.

[77] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp.163:14-17.

[78] *See In re Hoffman*, 52 B.R. 212, 215 (Bankr. D.N.D. 1985) ("Feasibility as noted in the case of *In re Bergman*, 585 F.2d 1171 (2nd Cir. 1978), contemplates 'the probability of actual performance of the provisions of the plan. *Sincerity, honesty and willingness are not sufficient to make the plan feasible*, and neither are visionary promises. The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.'") (emphasis added).

a debtor must provide "reasonable assurance" that the plan can be effectuated. The Debtor here failed to do so, and the Court erred by concluding that the Debtor's Plan was feasible under § 1129(a)(11). At a minimum, SkyTel has presented a substantial case on the merits as to this issue.

(ii) Whether the Bankruptcy Court erred in concluding that the Plan satisfies the "good faith" requirements of 11 U.S.C. § 1129(a)(3)

28. At the Confirmation Hearing and in its Objection, SkyTel argued that the Plan should not be confirmed because it had not been proposed by the Debtor in good faith as required by § 1129(a)(3).[79] SkyTel argued, among other things, that the Debtor's Plan: (1) was not feasible and thus not proposed in good faith; (2) was not proposed by an "honest but unfortunate debtor" with the legitimate and honest purpose to reorganize; (3) was filed as part of a litigation tactic to attempt to use and manipulate the bankruptcy system and laws to escape the Show Cause Hearing and to obtain relief under *Second Thursday*; and (4) was designed to improperly provide Choctaw with a potentially huge windfall.

29. Nevertheless, without making any explicit findings of fact regarding § 1129(a)(3) in the Bench Opinion,[80] the Court confirmed the Plan and stated in the Confirmation Order simply that "[t]he Plan has been proposed in good faith and not by any means forbidden by law."[81] SkyTel appealed the Confirmation Order as to this issue and, at the very least, has presented a substantial case on the merits.

30. Section 1129(a)(3) requires that a plan be proposed in good faith and not by any means forbidden by law.[82] This requirement "protects the integrity of the bankruptcy courts and prohibit[s] a debtor's misuse of the process where the overriding motive is to delay creditors

[79] *See* SkyTel's Objection, Dkt. #806, at pp. 49-54.
[80] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 182-190.
[81] *See* Confirmation Order, Dkt. #973, at p. 3, ¶ 8(c).
[82] 11 U.S.C. § 1129(a)(3).

without any possible benefit, or to achieve a reprehensible purpose through manipulation of the bankruptcy laws."[83] A finding of good faith turns on the totality of the circumstances.[84]

31. As explained by the Fifth Circuit: "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129(a)(3) is satisfied."[85] Discussing the concept of "good faith" in the context of filing a petition, the Fifth Circuit observed that "good faith implies an honest intent and genuine desire on the part of the petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose."[86]

32. As with the other requirements of § 1129(a), the Debtor bore the ultimate burden of establishing that that Plan was proposed in good faith by a preponderance of the evidence.[87] On Appeal, SkyTel contends, among other things, that the Debtor failed to meet that burden. At a minimum, SkyTel has presented a substantial case on the merits as to this issue.

33. First, as set forth above, the Plan is not feasible and therefore indicates a lack of good faith.[88]

34. Second, the Plan was not proposed by an "honest but unfortunate debtor" with the legitimate and honest purpose to reorganize. Instead, the Debtor filed this case and proposed the Plan in an effort to manipulate the bankruptcy system to facilitate avoiding the Show Cause Hearing and other pending FCC proceedings. Indeed, at the Confirmation Hearing, SkyTel contended and provided sufficient evidence that the Debtor filed the Bankruptcy Case and

---

[83] *Suggs v. Stanley (In re Stanley)*, 224 Fed. Appx. 343, 346 (5th Cir. 2007) (citing *In re Elmwood Dev. Co.*, 964 F.2d 508, 510 (5th Cir. 1992)).

[84] *In re Sun Country Dev.,* 764 F.2d 406, 408 (5th Cir.1985); *In re T-H New Orleans Ltd. Pshp.*, 116 F.3d 790, 802 (5th Cir. 1997).

[85] *In re Sun Country Dev.,* 764 F.2d at 408.

[86] *In re Metro. Realty Corp.*, 433 F.2d 676, 678 (5th Cir. 1970) (citing *In re S. Land Title Corp.*, 301 F. Supp. 379, 428 (E.D. La. 1968)).

[87] *In re Briscoe Enter., Ltd., II,* 994 F.2d 1160, 1165 (5th Cir.1993).

[88] *See In re Immenhausen Corp*., 172 B.R. 343, 348 (Bankr. M.D. Fla. 1994).

proposed the Plan for the primary purpose of using *Second Thursday* to attempt to avoid the consequences of its principals' wrongdoing.[89] Had the Debtor thought it could prevail on the merits at the Show Cause Hearing (and thus avoid the consequences of prior misconduct), it could have done so with *much* less effort than it expended in the Bankruptcy Case.

35. Third, in the very unlikely event the FCC ultimately allows the Debtor to assign the Licenses to Choctaw, a strong possibility exists that Choctaw would receive a vast windfall. Especially considering the close ties between Choctaw and the Debtor, this is indicative of a lack of good faith.

36. Despite these circumstances, the Court confirmed the Debtor's Plan. In the Confirmation Order, the Court simply held that "[t]he Plan has been proposed in good faith and not by any means forbidden by law."[90] In its Bench Opinion, the Court made *no* findings of fact as to the Debtor's good faith.[91] Accordingly, because the totality of the circumstances presented in SkyTel's Objection and at the Confirmation Hearing demonstrate a lack of good faith, SkyTel's Appeal presents a substantial case on the merits as to this issue.

(iii) Whether the Bankruptcy Court erred in concluding that the Debtor complied with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. § 1129(a)(2), despite the fact that, among other things, the Debtor unilaterally abandoned certain site-based Licenses without notice to creditors or authorization from the Bankruptcy Court

37. In its Objection and at the Confirmation Hearing, SkyTel argued that the Plan was unconfirmable for its failure to comply "with all of the applicable provisions of the Code during the pendency of the bankruptcy case."[92] Specifically, SkyTel argued that the Debtor entered into a "Limited Joint Stipulation" with the EB, whereby the Debtor voluntary abandoned numerous,

[89] This is evident from, among other things, the terms of the proposed Plan and the Reardon voicemail, discussed in SkyTel's Request for Certification, at p. 11.

[90] *See* Confirmation Order, Dkt. #973, at p. 3, ¶ 8(c).

[91] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 182-190.

[92] *See* SkyTel's Objection, Dkt. #806, at pp. 58-60 (citing 11 U.S.C. § 1129(a)(2)).

valuable estate assets by turning over certain site-based Licenses to the FCC for cancellation.[93] These site-based Licenses constituted a significant part of the Debtor's total assets, and even the Debtor admitted that these abandoned Licenses had value under certain circumstances.[94]

38. By abandoning these assets without notice or Court approval, the Debtor violated the Code, including § 554(a),[95] thereby rendering the Plan unconfirmable under § 1129(a)(2). In confirming the Plan, the Court did not specifically address SkyTel's objection in this regard. Instead, the Confirmation Order simply states that both the Plan and the Debtor have "complied with all applicable provisions of Title 11 of the United States Code."[96] And, in any event, SkyTel's Appeal presents a substantial case on the merits as to this issue.

(iv) Whether the Bankruptcy Court erred in concluding that the Plan complied with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. § 1129(a)(1), despite the fact that, among other things, the Plan provides that the Debtor will, as of the Effective Date of the Plan, "assume and assign to "Choctaw" "all . . . future contracts to sell FCC Spectrum Licenses," without the Bankruptcy Court first making a determination upon notice and a hearing that each of the elements of 11 U.S.C. § 363 have been complied with and that any proposed "future contract[] to sell FCC Spectrum Licenses" can otherwise be approved pursuant to applicable law

39. SkyTel further objected to confirmation because the Plan's proposed treatment of certain executory contracts and unexpired leases violated various provisions of the Code.[97] Thus, confirmation was impermissible under § 1129(a)(1). Specifically, the Plan provides that the Debtor will assume and assign to Choctaw "[a]ll Executory Contracts, including all current or *future* contracts to sell FCC Spectrum Licenses, that have not been previously rejected, or are the subject of a pending motion to reject as of the Confirmation Hearing" and that such

[93] A copy of the Limited Joint Stipulation is attached to SkyTel's Objection as "Exhibit E".
[94] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 145:18-25, 146:1-11.
[95] Section 554(a) governs the circumstances in which a debtor-in-possession may abandon property, which is only allowed after notice and a hearing.
[96] *See* Confirmation Order, Dkt. # 973, at p. 3, ¶s 8(a)-(b).
[97] *See* SkyTel's Objection, Dkt. # 806, at p. 60.

Executory Contracts will be assumed and assigned "as of the Effective Date pursuant to Bankruptcy Code §§ 365 and 1123."[98]

40. However, under the Code, "current or future contracts to sell FCC Spectrum Licenses" cannot be subject to assumption/assignment without the Court, upon appropriate notice, considering and making a determination at a hearing that each of the elements of § 363 have been complied with and that the proposed assumption/assignment can be approved. In confirming the Plan, the Court failed to specifically address this objection; instead, the Court merely stated that the Plan "complies with the applicable provision of Title 11 of the United States Code."[99] This issue, now on appeal, raises a substantial case on the merits.

(v) Whether the Bankruptcy Court erred in concluding in the Confirmation Order that "Choctaw" is a good faith purchaser *as contemplated by 11 U.S.C. § 363(m)*

41. Under the Plan and the Disclosure Statement, including the Choctaw Proposal, the transfer/assignment of the Licenses to Choctaw's subsidiary, Holdings, is to take place *through the Chapter 11 Plan*, subject to and upon FCC approval.[100] The Plan proposes a transfer of assets *through a plan of reorganization* -- as contemplated under § 1123(a)(5)(B) -- and not through a § 363 sale. Neither the Plan nor the Disclosure Statement provide that the transfer/assignment is to take place under § 363 of the Code -- indeed, the Confirmation Hearing record *is completely devoid of any reference to § 363 or 363(m) as it relates to the proposed transfer/assignment*.

42. While, at the end of the Confirmation Hearing, the Court made a finding on the record, at the request of the Debtor, that "Choctaw" was a "good faith purchaser," the Debtor *never* indicated in the evidence presented or in the arguments made at the Confirmation Hearing

[98] *See* Plan, Dkt. #669, at p. 23 (emphasis added); *see* Disclosure Statement, Dkt. #668, at p. 38 (emphasis added).

[99] *See* Confirmation Order, Dkt. #973, at p. 3, ¶8(a).

[100] *See e.g.* Plan, Dkt. #669, at pp. 10, 15-19.

that the proposed transfer/assignment was to take place under § 363 or that § 363(m) applied. Days after the Confirmation Hearing, however, the Bankruptcy Court included in the Confirmation Order, at the Debtor and Choctaw's request and over SkyTel's objection, "that Choctaw is a good faith purchaser *as contemplated by 11 U.S.C. § 363(m)*."[101]

43. This finding is potentially significant. Section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith . . . ."[102] Accordingly, under § 363(m) -- assuming it properly applies here -- there is a possibility that SkyTel's Appeals could become statutorily moot at some point, at least in part.

44. SkyTel has appealed the belated inclusion of § 363(m) in the Confirmation Order. And while there is no controlling law as to whether a Confirmation Order may belatedly include such a reference, or whether a transfer/assignment of assets through a reorganization plan even properly constitutes a sale under § 363(b) or (c), SkyTel's appeal of this issue undoubtedly presents a substantial case on the merits.

45. Indeed, the Fifth Circuit addressed this issue in *In re Texas Extrusion Corp.*, but did so in dicta and decided the case on other grounds.[103] In that case, a bankruptcy court's confirmation order provided that the debtors would sell assets of the estate to a third party under 11 U.S.C. § 363.[104] On appeal, those objecting to confirmation argued that the reference was improper because § 363 had never been mentioned in the disclosure statement, plan, or at the

[101] *See* Confirmation Order, Dkt. #s 973, 980, at p. 5 (emphasis added).
[102] 11 U.S.C. § 363(m).
[103] *In re Texas Extrusion Corp*., 844 F.2d 1142 (5th Cir. 1988).
[104] *Id*. at 1164.

confirmation hearing.[105] The objectors argued that the belated reference to § 363 -- made at the debtor's request -- was done "in order to prevent appellants from unwinding the sale to [the third party] in the event of a reversal of the confirmation of the Plan on appeal."[106]

46. The Fifth Circuit first noted that it had "doubt as to whether the application of 11 U.S.C. § 363 was proper . . . . [because] Section 363 is part of the Bankruptcy Code dealing with administrative powers."[107] Indeed, both §§ 363(b) and (c) -- to which § 363(m) is applicable -- "deal with the authority of a bankruptcy trustee to use, sell, or lease property of the estate."[108] According to the Court, "[t]here is a definite implication that these provisions concern the trustee's authority during the *administration* of the estate and not at the *final disposition* of the property of the estate pursuant to a plan of reorganization."[109] But, in concluding, the Court "decline[d] . . . to rule on the propriety of the application of 11 U.S.C. § 363 to the sale of property pursuant to a plan of reorganization" because the Court decided the case on a different, unrelated issue.[110]

47. In addition, at least one court within the Fifth Circuit has recognized that a § 363 sale is an entirely different procedure than a sale or transfer/assignment under a Chapter 11 plan of reorganization. In *In re Gulf Coast Oil Corp.*, the Bankruptcy Court for the Southern District of Texas explained that:

> There are two sections of the Bankruptcy Code applicable in chapter 11 that explicitly authorize the sale of property. Section 363(b) authorizes a trustee to sell property of the estate outside the ordinary course of business. Section 1123 provides that a chapter 11 plan may include provisions (i) for transfer of all or any party of the property of the estate, and (ii) for sale of all or any part of the

---

[105] *Id*.
[106] *Id*. at 1164-65.
[107] *Id*. at 1165.
[108] *Id*.
[109] *Id*. (emphasis added).
[110] *Id*.

> property of the estate. . . . The Bankruptcy Code does not provide any explicit guidance to determine when § 363(b) is the appropriate procedure and when § 1123 is the appropriate procedure.[111]

48. Based on the foregoing, SkyTel's appeal regarding the belated inclusion of § 363(m) in the Confirmation Order presents a substantial case on the merits.

(vi) Whether the Bankruptcy Court erred in confirming this Plan that defines "consummation" in a manner that, especially when read in conjunction with the Plan's definition of "effective date" and the sentence that follows the Plan's definition of "effective date," is contrary to the Bankruptcy Code's definition of "substantial consummation" set forth in 11 U.S.C. § 1101(2)[112]

49. Equitable mootness is a prudential doctrine,[113] under which appellate courts have the discretion to dismiss an appeal of a confirmation order where (1) no stay has been obtained; (2) the plan has been "substantially consummated"; and (3) the relief requested by the appellant would affect either the rights of parties not before the court or the success of the plan.[114]

50. The second factor, substantial consummation, is a term of art defined in the Code.[115] Indeed, in defining this phrase, the Fifth Circuit has adopted the Code's definition of "substantial consummation" under § 1101(2), holding that "it informs our judgment as to when finality concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal."[116] The Fifth Circuit has held that as to an equitable mootness determination, "'[s]ubstantial consummation' is

---

[111] *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 414-15 (Bankr. S.D. Tex. 2009).

[112] As noted in the Designation/Statement, this issue is only an issue to the extent the Debtor or others hereafter attempts to argue that the time at which the Plan should be deemed to be "substantially consummated" should be determined by reference to anything other than § 1101(2) of the Bankruptcy Code.

[113] *Alberta Energy Partners v. Blast Energy Servs. (In re Blast Energy Servs.)*, 593 F.3d 418, 424 (5th Cir. 2010) (citing *In re Vineyard Bay Dev. Co.*, 132 F.3d 269, 271 (5th Cir. 1998)).

[114] *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994).

[115] *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 302, n.8 (5th Cir. 2002) ("Substantial consummation' is a term of art defined in the Bankruptcy Code."); *See also Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 889 ( S.D.N.Y. 1994) ("'Substantial consummation is a term of art under Chapter 11 of the U.S. Bankruptcy Code."); *In re Texaco, Inc.*, 92 B.R. 38, 46 n.12 (S.D.N.Y. 1988) (same).

[116] *In re Manges*, 29 F.3d at 1041.

a *statutory* measure for determining whether a reorganization plan may be amended or modified by the bankruptcy court."[117] Under § 1101(2) of the Code,

> "substantial consummation" means—(A) a transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.[118]

51. While the Plan does not necessarily attempt to redefine "substantial consummation," it does define the term "consummation" to mean "that substantially all payments required to be made under this Plan on the Effective Date have been made and Notice of the Effective Date has been filed and served."[119] And, as discussed in SkyTel's Objection,[120] there are ways to interpret the foregoing definition so that it conflicts with and contravenes the Code's definition of "substantial consummation." So, to the extent that the Debtor or others may ultimately argue that the Plan's definition of "consummation" should trump the Code's definition of "substantial consummation" in a potential equitable mootness analysis, SkyTel contends that the Code's definition of "substantial consummation" controls, and has presented a substantial case on the merits as to that issue on appeal.

[117] *Id*. at p. 1041.
[118] 11 U.S.C. § 1101(2).
[119] *See* Plan, Dkt. #669, at p. 4.
[120] *See* SkyTel's Objection, Dkt. # 806, at p. 29 n. 148.

(vii) Whether the Bankruptcy Court erred in confirming the Plan without specifically determining whether the FCC spectrum licenses proposed therein to be transferred are in fact property of the estate, in light of the pending FCC Proceedings and New Jersey District Court Litigation referred to in the Confirmation Order, which are related to determining what, if any, interest the Debtor has or may have in those licenses, or otherwise

52. Under § 541(a)(1), "all legal or equitable interests of the debtor in property as of the commencement of the case become property of the bankruptcy estate."[121] As such, "[t]he determination of whether property is in fact property of the estate is crucial because 'the Bankruptcy [Code] does not authorize a trustee to distribute other people's property among a [debtor's] creditors.'"[122] For example, the Fifth Circuit has held that where a debtor-in-possession proposes to sell assets outside the ordinary course of business, the Code "requires that the assets be property of the estate,"[123] which, in turn, "is determined by §541."[124]

53. But here, the Court confirmed a Plan that proposes to transfer substantially all of the Debtor's purported assets to Choctaw through use of *Second Thursday*, subject to and upon FCC approval, *without* the Court first determining whether the subject assets are in fact property of the estate.

54. However, as recognized in the HDO, including in Issue G thereof, a site-based license authorization *terminates automatically* by operation of law, and without further affirmative FCC action required, if the licensee fails to timely construct or operate the station.[125] Here, there are "substantial and material questions of fact" as to whether the Debtor "purports to hold authorizations that have cancelled automatically for lack of construction or permanent

[121] *In re Jones Const. & Renovation, Inc.*, 337 B.R. 579, 585 (Bankr. E.D. Va. 2006) (citing 11 U.S.C. § 541(a)(1)).

[122] *In re Jones Const. & Renovation, Inc.*, 337 B.R. at 585-86 (citing *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135-36 (1962)).

[123] *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).

[124] *Id*.

[125] *See* HDO, at p. 6 n. 21, at ¶ 61, and at p. 28.

discontinuance of operation."[126] And to the extent the Site-Based Licenses have in fact *already* terminated (including prior to the filing of the Bankruptcy Case), those licenses are not and cannot be property of the estate,[127] and the Court should not have confirmed a Plan that proposes their transfer without that determination being made in advance.

55. Based on the foregoing, SkyTel's appeal presents a substantial case on the merits as to this issue.

(viii) Whether the Bankruptcy Court erred when it overruled SkyTel's objection to Robert J. Keller testifying as an "expert in the area of the FCC communications law, with special emphasis on Second Thursday doctrine as it applies to this case"

56. At the Confirmation Hearing, the Debtor tendered -- and the Court accepted -- Robert J. Keller ("Keller") as an "expert in the area of the FCC communications law, with special emphasis on *Second Thursday* Doctrine as it applies to this case."[128] Significantly, however, in December of 2011, the Bankruptcy Court authorized the Debtor to employ Keller as its "special FCC counsel"[129] in the pending FCC Proceedings, *including* the Show Cause Hearing in which the Debtor intends to seek relief under *Second Thursday*.[130]

57. Because Keller was (and still *is*) actively representing the Debtor before the FCC, SkyTel moved to exclude Keller's testimony under Rule 702 of the Federal Rules of Evidence, *Daubert v. Merrell Dow Pharmaceuticals*,[131] and other applicable law, and objected to that testimony being offered and admitted at the Confirmation Hearing.[132] The Court, however,

---

[126] *See e.g.* HDO, at ¶ 2.

[127] Rather, the frequencies covered by any such terminated licenses would automatically revert to SkyTel. *See* 47 C.F.R. § 80.385(c).

[128] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 157:14-17, 165:16-17.

[129] *See* Order Authorizing Debtor to Employ Special Counsel, Dkt. #237.

[130] *See* Debtor's Application to Employ, Dkt. #153, at p. 1.

[131] *Daubert*, 509 U.S. 579 (1993).

[132] *See* Dkt. #846 (the "Motion to Exclude"); *see also* SkyTel's objection to the Keller testimony during the Confirmation Hearing, and the related arguments and bench opinion, attached as Exhibit E to the Request for Certification (Dkt. #1044).

denied SkyTel's motion and overruled SkyTel's objection, and SkyTel raises this issue on Appeal. Because Keller, as the Debtor's FCC counsel, had an inherent, disqualifying conflict of interest, which rendered his testimony unreliable, untrustworthy, and unfit "to assist the trier of fact,"[133] SkyTel presents a substantial case on the merits as to this issue.

58. As a "gatekeeper" under Rule 702 and *Daubert*, a trial judge has the "inherent power to disqualify an expert witness when a conflict of interest exists."[134] In doing so, "the overall guiding principle is to preserve the integrity of court proceedings, and that any remedy imposed in a case where an expert witness has a conflict of interest should promote fundamental fairness in the litigation process."[135] If a conflict arises, the court "can disqualify an expert 'under any set of circumstances upon the application of any particular legal theory to protect privileges *or the public confidence.*"[136]

59. Here, Keller -- as the Debtor's FCC counsel -- had an inherent, disqualifying conflict of interest. Essentially, Keller attempted to -- and *did* -- act as both advocate and witness on the Debtor's behalf. This conflict rendered his proposed testimony unreliable, untrustworthy, and unfit to "assist the trier of fact."[137]

60. *Lippe v. Bairnco Corporation* is illustrative of this point.[138] In *Bairnco*, a creditor brought a fraudulent conveyance action against a Chapter 11 debtor, challenging the debtor's numerous transfers of profitable businesses to various subsidiaries of Bairnco, the debtor's parent

---

[133] F.R.E. 702.
[134] *Sells v. Wamser*, 158 F.R.D. 390, 393 (S.D. Ohio 1994).
[135] *Id*.
[136] *U.S. v. Salamanca*, 244 F. Supp. 2d 1023, 1025 (D.S.D. 2003) (emphasis added) (citing *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 277-78 (S.D. Ohio 1988)).
[137] F.R.E. 702.
[138] *Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003), *aff'd*, 99 Fed. Appx. 274 (2nd Cir. 2004).

company.[139] At issue, was "whether the newly-created subsidiaries paid 'fair consideration' for the assets they purchased from [the debtor]" and "whether the management of [the debtor] and the purchasing companies acted with fraudulent intent . . . ."[140] To prove these issues, the creditor retained law professor William J. Carney as its expert witness, and the debtor filed a motion to exclude, arguing, among other things, that Carney was also the creditor's previous attorney.[141]

61. In excluding Carney from testifying, the court first noted that, as to relevance and reliability, an "expert's role is to assist the trier of fact by providing information and explanations; the expert's role is ***not to be an advocate***.'"[142] Further, "'when expert witnesses become partisans, objectivity is sacrificed to the need to win.'"[143] Because Carney was or had been the creditor's attorney, the court held that "[i]t would be most inappropriate to permit him now to testify as an expert witness about ***the very matters he helped develop as a lawyer-advocate***."[144] The court further stated that, "because of his advocacy on behalf of [the creditor] as counsel and legal advisor, I do not believe that [Carney] can now testify with the detachment and independence that one would expect from an expert witness offering views as a professional."[145] The court concluded that "[o]f course many expert witnesses are biased and the lack of bias is not required for expert testimony to be admissible. ***But here [the trust] has[s]***

[139] *Id*. at 681.
[140] *Id*.
[141] *Id*. at 681-84.
[142] *Id*. at 687 (emphasis added).
[143] *Id*. (citing *Cacciola v. Selco Balers, Inc.*, 127 F. Supp. Ed 175, 184 (E.D.N.Y. 2001) (quoting *Rubinstein v. Marsh*, 1987 U.S. Dist. LEXIS 16882, at *7 (E.D.N.Y. Dec. 10, 1987)).
[144] *Bairnco*, 288 B.R. at 688 (emphasis added).
[145] *Id*.

***gone too far, for they seek to call as a witness someone who has acted as their attorney, with a 'duty . . . to represent [his] client[s] zealously within the bounds of the law."***[146]

62. In *Bairnco*, the court correctly noted that an inherent conflict exists when an attorney testifies as an expert witness on his client's behalf.[147] On one hand, an expert's obligation is "to approach every question with independence and objectivity" and view "facts and data dispassionately, without regard to the consequences for the client."[148] On the other, an attorney's obligation -- and *ethical duty*[149] -- is "to make the best possible argument in support of her client" and, "while they must be truthful concerning facts and . . . law, their opinions and arguments must always be adapted to the needs of their clients."[150] Even if a client waives this conflict, an attorney is still barred from testifying -- not because of any breach of the duty of

[146] *Id*. at pp. 688-69 (emphasis added) (citing 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* §§ 702-59 to -60 & n. 38 (Joseph M. McLaughlin ed., 2d ed. 2002); N.Y. Code of Prof'l Responsibility EC 7-1 (McKinney 2002)). *See also Public Patent Found., Inc. v. GlaxoSmithKline Consumer Healthcare, L.P.*, 801 F. Supp. 2d 249 (S.D.N.Y. 2011) (Court disqualified expert from testifying where expert had served as plaintiff's trial attorney. This testimony "could 'hardly be considered independent of his client's due to his role as attorney of record in [this] action" which included taking the depositions of at least two of [p]laintiff's four witnesses." By testifying, attorney-expert "improperly . . . assum[ed] the role of advocate . . . ." ) (citing *Ziggity Sys., Inc. v. Val Watering Sys.*, 769 F. Supp. 752, 807 (E.D. Pa. 1990) ("[An attorney with] a direct interest in the . . . case . . . lacks credibility from that deficiency only.")).

[147] *See* ABA Standing Comm. on Prof. Conduct, Formal Op. 97-407 (1997) ("A duty to advance a client's objective diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert."); D.C. Ethics Op. 337 (An expert "is presented as an objective witness and must even provide opinions *adverse* to the party for whom she expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the role of an expert witness.").

[148] Steven Lubet, *Expert Witnesses: Ethics & Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 467-468 (Spring 1999).

[149] *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000) ("An 'actual conflict' exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the [client] by choosing between or blending the divergent or competing interests of a former or current client."); *U.S. v. Cavin*, 39 F.3d 1299, 1308 (5th Cir. 1994) ("One of the basic tenants of our adversarial legal system is that the lawyer owes the client loyalty and zealous representation.").

[150] Lubet, *supra* note 120, at 468.

loyalty -- but because the conflict itself renders the testimony unreliable, untrustworthy, and not of assistance to the trier of fact.[151]

63. Keller possessed the same disqualifying conflict of interest as the expert in *Bairnco*. In the pending FCC Proceedings, the Debtor retained Keller to, among other possible things, explore and develop the legal theories and arguments needed to attempt to obtain *Second Thursday* relief. Simultaneously, however, Keller testified that the Debtor and Choctaw will likely obtain such treatment. As in *Bairnco*, it was "most inappropriate to permit [Keller] to testify as an expert witness about ***the very matters he helped develop as a lawyer-advocate***."[152] Because of this inherent, disqualifying conflict, Keller's testimony should have been excluded.

64. In overruling SkyTel's objection to Keller's testimony, the Court noted that "[t]his is a close question" and "[y]ou don't like to have lawyers testifying in cases when they're representing a client."[153]

65. SkyTel does not agree that the Motion to Exclude and the related objection presented a "close question." Instead, the Bankruptcy Court erred when it overruled SkyTel's objection to Keller's testimony. Regardless, it is clear that SkyTel has, at a minimum, presented a substantial case on the merits as to this issue.

(ix) Whether the Bankruptcy Court erred when it overruled SkyTel's objection to the admission of Robert J. Keller's "expert report" into evidence

66. After the Court erroneously allowed Keller to testify as an expert witness for the Debtor, the Debtor sought to admit Keller's unsigned and unsworn "expert report" (the "Report")

[151] *See Bairnco*, 288 B.R. at 678.
[152] *Bairnco*, 288 B.R. at 688 (emphasis added).
[153] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 165:1-5.

into evidence.[154] SkyTel objected, arguing that the Report was clearly hearsay,[155] but the Court overruled the objection without explanation.[156] Accordingly, SkyTel has raised this error on Appeal.

67. Keller's Report was inadmissible for the reasons set forth above -- Keller possessed an inherent, disqualifying conflict of interest.

68. In addition, the unsigned, unsworn Report constituted inadmissible hearsay. The law on this issue is clear: "[u]nsworn expert reports are hearsay"[157] and are not admissible or subject to a relevant exception. In holding that expert reports are inadmissible hearsay, the Sixth Circuit has explained that:[158]

> [Federal Rule of Evidence 702] permits the admission of expert opinion *testimony* not opinions contained in documents prepared out of court. Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion. Rules 702 and 703 do not, however, permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.[159]

As such, the Court clearly erred as a matter of law, and SkyTel's Appeal presents a substantial case on the merits as to this issue as well.

69. Moreover, the admission of Keller's report over SkyTel's objection prejudiced SkyTel and was not, therefore, harmless error. Similarly, the Court accepting Keller as an expert

---

[154] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 182:19-20; *see also* "Expert Opinions That May Be Offered by Robert J. Keller . . . .," a copy of which is attached as **Exhibit L** hereto.

[155] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 182:22-25.

[156] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 183:1-2.

[157] *Bomar v. City of Pontiac*, 2010 U.S. Dist. LEXIS 83904, at *31-32 (E.D. Mich. Aug. 17, 2010)(citing *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469 (6th Cir. 2008); *Pack v. Damon Corp.*, 434 F.3d 810, 815 (6th Cir. 2006)); *See also In re Quigley Co.*, 437 B.R. 102, 151 (S.D.N.Y. 2010) ("As a rule, expert reports are hearsay.") (citing *Ake v. GMC*, 942 F. Supp. 869, 878 (W.D.N.Y. 1996); *Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 2002 U.S. Dist. LEXIS 7535, 2002 WL 826956, at *7 (S.D.N.Y. May 1, 2002)).

[158] *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-29 (6th Cir. 1994).

[159] *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-29 (6th Cir. 1994) (emphasis in original) (citing *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984)).

over SkyTel's objection (as discussed above) also prejudiced SkyTel and cannot be deemed harmless error, even assuming *arguendo* that a harmless error analysis would otherwise apply to that decision.

70. In the Fifth Circuit, "the erroneous admission of hearsay evidence is amenable to harmless error analysis."[160] Under this analysis, "an error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the [fact finder] or had but a very slight effect on its verdict."[161]

71. Here, the Debtor had the burden of proving by a preponderance of the evidence that the Plan was feasible. And, as set forth above, the feasibility of the Plan, as it is written, ultimately depends on whether the Debtor will succeed in getting approval from the FCC to transfer the Licenses to Choctaw under *Second Thursday*.[162] But the only expert testimony the Debtor provided on this subject was Keller's inadmissible testimony and expert report -- which should have been excluded.

72. Choctaw did provide the expert testimony of former FCC attorney Samuel L. Feder ("Feder"), who testified that *Second Thursday* allows the FCC to approve the transfer of licenses -- even when the qualifications of the licensee to hold those licenses have been called into question -- where three conditions are met: (1) the licensee is in bankruptcy; (2) the alleged wrongdoers will not participate in any way in the ongoing business of the transferee; and (3) the alleged wrongdoers will receive no benefit from the relief, or only a minor benefit that is outweighed by the equities of providing relief to innocent creditors.[163]

---

[160] *Pyles v. Johnson*, 136 F.3d 986, 994 (5th Cir. 1998).
[161] *Munn v. Algee*, 924 F.2d 568, 573 (5th Cir. 1991).
[162] Of course, SkyTel has argued and continues to argue that there are other significant hurdles to the transfer of any Licenses and effectuation of the Plan, which hurdles exist independently of *Second Thursday*, even assuming it is somehow applied.
[163] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 247:13-23.

73. Feder also testified, with very little explanation given, that he believed that the Debtor's Plan would pass muster under *Second Thursday*, specifically because:

> Obviously Maritime's in bankruptcy, that's why we're here. We've seen assurances that the alleged wrongdoers identified by the FCC, Mr. and Mrs. DePriest[,] are not going to be involved in the ongoing operations of Choctaw, and number three, we've heard of no material benefits that would be provided to those alleged wrongdoers.[164]

In this testimony, Feder failed to mention, much less discuss, creditor innocence when opining how *Second Thursday* would apply to the facts of this case. That is interesting given, among other things, the actual knowledge that Collateral Plus, the largest secured creditor participating in Choctaw, had of the "clouds" on the Licenses at the time it obtained its secured debt post-petition.[165]

74. In any event, in addition to the reasons set forth above and in the Request for Certification which establish that *Second Thursday* does not apply to the Debtor's case, SkyTel contends that its expert, Professor James Ming Chen ("Professor Chen"),[166] sufficiently rebutted Feder's testimony by noting that, among other things, Feder's testimony failed to sufficiently take into account the innocence (or lack thereof) of the creditors in this case (e.g., by excluding that consideration from his specific discussion of why he thought *Second Thursday* was met in this case and ignoring what certain creditors knew or should have known at the time they lent money to the Debtor), the potential windfall to Choctaw in this case, and the broader implications of the public interest, convenience, and necessity doctrine.[167] Professor Chen correctly noted that the *Second Thursday* doctrine is *more* than the routine three-part test

[164] *See* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 248:4-14.

[165] *See e.g.* Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 191-193; Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 21-22.

[166] *See* Confirmation Hearing Transcript Vol. II (Exhibit J), at p. 82.

[167] *See e.g.* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 107:12-25; 108:1-14.

espoused by Feder.[168] Indeed, the FCC will consider other factors -- including the public interest, convenience, and necessity doctrine, as applied to the facts of the specific case.[169] Moreover, Professor Chen testified that even if *Second Thursday* could conceivably be met, numerous other risky contingencies existed rendering the Plan not feasible.[170]

75. Based on the above, SkyTel contends that Professor Chen sufficiently rebutted Feder's testimony, increasing the Court's reliance on Keller's testimony and Report. Accordingly, the erroneous admission of that testimony and Report over SkyTel's objection had considerably more than a "very slight effect" on the Court's decision to confirm the Plan and did not constitute harmless error.

76. For all of the foregoing reasons, SkyTel's Appeal presents a substantial case on the merits as to *each* issue appealed. Accordingly, the first factor in the aforementioned four-factor test weighs heavily in SkyTel's favor.

***b. SkyTel will be irreparably harmed absent a stay***

77. Under the second factor in the four-factor test, a movant must show that it will suffer irreparable harm absent a stay.[171] An irreparable harm is generally one that "cannot be undone through monetary releases."[172] As such, "where the denial of a stay pending appeal *risks* mooting any appeal of significant claims of error, the irreparable harm requirement is

[168] *See e.g.* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 137:25 to 138:19.
[169] *See e.g.* Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 116-120,
[170] *See e.g*. Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 136, 137.
[171] *Ruiz*, 650 F.2d at 565.
[172] *Spillman Dev. Group, Ltd. v. Am . Bank of Tex. (In re Spillman Dev. Group, Ltd.)*, 2010 Bankr. LEXIS 3893, at *8 (W.D. Tex. Oct. 29, 2010) (citing *Spiegel v. City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981)).

satisfied."[173] Indeed, as the United States District Court for the Southern District of New York has held, the "loss of appellate rights is a '*quintessential* form of prejudice.'"[174]

78. Here, SkyTel will suffer irreparable harm if a future appellate court dismisses SkyTel's Appeal as equitably moot, which is a risk particularly in the absence of the stay requested herein. In the Fifth Circuit, the equitable mootness doctrine "recognizes that a point exists beyond which a court cannot order fundamental changes in [chapter 11] reorganization[s]."[175] Thus, appellate courts have the discretion "to decline review of an otherwise viable appeal [where] the reorganization has progressed too far for the requested relief practicably to be granted."[176] To determine equitable mootness, courts within the Fifth Circuit consider three factors: "'(1) whether a stay was obtained; (2) whether the plan has been 'substantially consummated;' and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan.'"[177]

79. SkyTel believes that this Plan cannot be deemed substantially consummated prior to the time the FCC approves the assignment of the Licenses to Choctaw and that assignment ultimately occurs. However, there is nevertheless a risk -- particularly if the Motion is denied -- that an appellate court could: (a) disagree with SkyTel and find the Plan substantially

---

[173] *ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 348 (S.D.N.Y. 2007) (emphasis added).

[174] *Id.* at 348 (citing *Country Squire Assocs., L.P. v. Rochester Cmty. Sav. Bank (In re Country Squire Assocs., L.P.)*, 203 B.R. 182, 183 (B.A.P. 1st Cir. 1996)). *See also Daly v. St. Germain (In re Norwich Historic Pres. Trust, LLC)*, 2005 U.S. Dist. LEXIS 7171, at *9-11 (D. Conn. April 21, 2005); *Plains Farm Supply v. Tex. Equip. Co. (In re Tex. Equip. Co.)*, 283 B.R. 222, 228-29 (Bankr. S.D. Tex. 2002); *In re St. Johnsbury Trucking Co.*, 185 B.R. 687, 689-90 (S.D.N.Y. 1995); *Lutin v. U.S. Bankr. Ct. (In re Adver. Minging Sys. Inc.)*, 173 B.R. 467, 468-69 (S.D.N.Y. 1994); *In re Grandview Estates Assocs., Ltd.*, 89 B.R. 42, 42-43 (Bankr. W.D. Mo. 1988); *In re "Agent Orange" Prod. Liab. Litig*., 804 F.2d 19, 20 (2d Cir. 1986)).

[175] *Spencer Ad Hoc Equity v. Idearc, Inc. (In re Idearc, Inc.)*, 662 F.3d 315 (5th Cir. 2011).

[176] *Alberta Energy Partners v. Blast Energy Servs. (In re Blast Energy Servs.)*, 593 F.3d 418, 424 (5th Cir. 2010).

[177] *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber)*, 584 F.3d 229, 240 (5th Cir. 2009).

consummated and equitably mooted sooner; or (b) find the Appeal mooted prior to substantial consummation based on considerations related to the third equitable mootness factor set forth above. Such findings would deprive SkyTel of meaningful appellate review, and SkyTel would therefore suffer the "'*quintessential* form of prejudice.'"[178]

80. Accordingly, the second factor in the four-factor test weighs in SkyTel's favor, especially in light of the limited nature of the requested stay.

***c. The stay will not substantially harm the other parties***

81. Because the other parties will not be substantially harmed under the terms of and during SkyTel's proposed Limited Stay, this third factor in the four-factor test also weighs in SkyTel's favor.

82. First, as noted by the Southern District of Texas, harm to others can be reduced where an appeal is considered on an expedited basis, such as through a direct appeal to the Fifth Circuit.[179] Here, SkyTel has filed a *Motion and Request for Certification of Direct Appeal to the United States Court of Appeals for the Fifth Circuit* (referred to herein as the Request for Certification).[180] In this regard, the Debtor declined SkyTel's invitation to make a joint request for certification under 28 U.S.C. § 158(d)(2)(B)(ii), which the Court should take into consideration in the event the Debtor opposes this Motion. In any event, if SkyTel's direct

[178] *In re Adelphia Commc'ns Corp.*, 361 B.R. at 348 (citing *Country Squire Assocs.,* 203 B.R. at 183). *See also In re Norwich*, 2005 U.S. Dist. LEXIS 7171, at *9-11; *In re Tex. Equip. Co.*, 283 B.R. at 228-29; *In re St. Johnsbury Trucking*, 185 B.R. at 689-90; *In re Adver. Minging Sys.*, 173 B.R. at 468-69; *In re Grandview Estates Assocs.,* 89 B.R. at 42-43; *In re "Agent Orange" Prod. Liab. Litig*., 804 F.2d at 20.

[179] *See Bossart v. Havis (In re Bossart)*, 2008 U.S. Dist. LEXIS 17473, at *3-4 (S.D. Tex. March 6, 2008).

[180] *See* Dkt. #1044.

appeal efforts are unsuccessful, SkyTel intends to seek an expedited appeal under other applicable law.[181]

83. Second, the nature of the primary assets involved under the Plan, the terms of the Plan itself, and the proposed scope of the Limited Stay all work together to effectively negate (or at least drastically mitigate) any potential harm which the granting of the stay could cause to others. Because the FCC must approve the proposed transfer of the Licenses to Choctaw, because the FCC must also approve the transfer of any Licenses from Choctaw to any third parties, and because closing by Choctaw of sales of the Licenses to third parties is the primary anticipated source of payments to creditors under the Plan, the status quo is essentially maintained *at least* until such FCC approvals are obtained,[182] which could take quite some time.[183] Therefore, by conditioning the Limited Stay to expire at the earlier of a Final Appellate Decision *or* FCC approval of the assignment of the Licenses to Choctaw or otherwise, the Limited Stay ensures that very little if any harm (and assuredly no "substantial" harm) will be caused to other parties thereby.

84. Third, the Limited Stay further reduces potential harm to other parties by requiring the Notice.[184]

---

[181] *See e.g.* Fed. R. App. P. 2 ("On its own or a party's motion, a court of appeals may -- to expedite its decision or for other good cause -- suspend any provision of these rules in a particular case and order proceedings as it directs . . . ."); Fifth Circuit Rule 27.5 ("Motions to Expedite Appeal. Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause. If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date.").

[182] SkyTel says "at least" because there could be other obstacles to the closing of any License sales, even if initial FCC approval is obtained. Such obstacles include SkyTel's Application for Review, the New Jersey Litigation, and the fact that all or substantially all of the APAs have provisions under which the proposed purchaser of Licenses do not have to close until a "final order" is obtained.

[183] One reason for this is that, as recognized by FCC counsel at the Confirmation Hearing, it appears that Issue G will have to be decided before any relief under *Second Thursday* is even possible. *See* Confirmation Hearing Transcript Vol. II, at pp. 170:18 to 171:6.

[184] *See supra*, at pp. 7-8.

85. Accordingly, based on this case's distinct circumstances, and in light of the fact that SkyTel is making good faith efforts to eliminate potential harm to others pending the Appeal (including by seeking a direct appeal and proposing the conditional, limited stay proposed herein), the third factor in the four-factor test weighs heavily in SkyTel's favor.

***d. The stay will serve the public interest***

86. There is a strong public interest in preserving a party's right to appellate review, which may be eviscerated if a stay is denied. As one court has made clear:

> The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system. In other words, no single judge or court can violate the Constitution and laws of the United States, or the rules that govern court proceedings, with impunity, because nearly all decisions are subject to appellate review. At the end of the appellate process, all parties and the public accept the decision of the courts because we, as a nation, are governed by the rule of law. Thus, the ability to appeal a lower court ruling is a ***substantial and important right***.[185]

87. This is particularly true in bankruptcy, where "there is a significant public interest in vindicating the rights of the minority and preventing the will of the majority to go unchecked by appellate review."[186] Indeed, "a plan of reorganization which is unfair to some person may not be approved by the court though the vast majority of creditors have approved it."[187] In this regard, "[t]he public interest favors having legal matters decided on the merits."[188]

88. Moreover, Congress has recognized the need for appellate review of bankruptcy cases and has recently codified this policy by authorizing direct appeals of bankruptcy orders to the circuit courts: "The twin purposes of [§ 158(d)(2)] were to expedite appeals in significant

[185] *In re Adelphia Commn'cs Corp.*, 361 B.R. at 342 (emphasis added).

[186] *Id*. at 367. *See also id.* at 348 n. 41 ("The sanctity of Appellants' right to appellate review is not lessened because they represent a minority, in both number and priority of claims.").

[187] *Id*. at 368.

[188] *In re Bossart*, 2008 U.S. Dist. LEXIS 17473, at *4.

cases and to generate binding appellate precedent in bankruptcy . . . . Congress's purpose may be thwarted if equitable mootness is used to deprive the appellate court of jurisdiction . . . ."[189]

89. Because there is a risk that a future appellate court may dismiss SkyTel's Appeal as equitably moot, and because the stay requested herein is designed to minimize that risk, a stay of the Confirmation Order is in the public interest.

90. In addition, the stay will serve the public interest because, for the reasons discussed in the Request for Certification, the Confirmation Order involves matters of public importance.[190]

91. Accordingly, the fourth and final factor in the four-factor test weighs heavily in SkyTel's favor, the balance of the equities weighs in SkyTel's favor as well, and this Court should impose the Limited Stay to ensure a full determination of the Appeal on the merits.

**III. The Bond**

92. Under Rule 8005, a court "*may* condition the relief it grants under this rule on the filing of a bond or other appropriate security . . . ."[191] Thus, granting a bond is discretionary[192] and need not be required where "little or no damage will be incurred as a result of the stay."[193] The policy of a supersedeas bond, "is to preserve the status quo while protecting the non-appealing party's rights pending appeal."[194]

93. To determine "whether a bond should be ordered, the court generally looks to whether the bond would be necessary: (a) to protect against *diminution in the value of property*

[189] *In re Pac. Lumber*, 584 F.3d 229, 241-242 (5th Cir. 2009).
[190] *See* Dkt. #1044, at pp. 23-31.
[191] Fed. R. Bankr. P. 8005 (emphasis added).
[192] *In re Adelphia Commn'cs Corp.*, 361 B.R. at 350.
[193] *In re Sphere Holding Corp.*, 162 B.R. 639, 644(E.D.N.Y. 1994) (citing *In re Theatre Holding Corp.*, 22 B.R. 884, 885-86 (Bankr. S.D.N.Y. 1982).
[194] *In re Ellzey*, 2009 Bankr. LEXIS 2521, at *2 (Bankr. E.D. La. July 20, 2009); *Plains Farm Supply v. Tex. Equip. Co. (In re Tex. Equip. Co.)*, 283 B.R. 222 (Bankr. N.D. Tex. 2002).

pending appeal; and (b) to secure the prevailing party against any *loss* that might be sustained as a result of an ineffectual appeal."[195] To determine the amount, "the court applies equitable principles."[196] And, where the judgment appealed from is non-monetary, as here, "the value of the property is *not* considered the 'amount of the judgment' and is *not* included in the amount of the supersedeas bond."[197] "The purpose of a bond, after all, is to protect [the appellee(s)] against any *loss*, not to confer a windfall."[198]

***a. No bond should be required pending SkyTel's Appeal***

94. Because of the particular and distinct circumstances involved with this Plan and the assets which are proposed to be liquidated thereunder, and because of the conditional scope of the Limited Stay sought herein, a bond should not be required in this case.

95. There is no loss or risk of diminution in property value to protect against during the time period of the requested stay pending appeal.

96. As discussed above, the Debtor cannot transfer the Licenses to Choctaw, and the Licenses cannot be used to fund the vast majority of Plan payments, until, at the earliest, FCC approval is obtained (and not even then in SkyTel's view due to the other obstacles which exist and which have been discussed herein and in the Request for Certification, among other places). Under the terms of the Limited Stay, the Debtor may, among other things, seek FCC approval of the assignment of the Licenses from the Debtor to Choctaw, and, if the FCC approves the assignment of the Licenses, the Limited Stay would expire. The Limited Stay would also expire

[195] *In re Adelphia Commn'cs Corp.*, 361 B.R. at 350; *In re Tex. Equip. Co.*, 283 B.R. at 229 ("[A] bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal.") (quoting *Poplar Grove*, 600 F.2d at 1191).

[196] *In re. Tex. Equip. Co.*, 283 B.R. at 229 (citing *Miami Int'l Realty CO. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986)).

[197] *In re Tex. Equip. Co.*, 283 B.R. at 229 (emphasis added) (citing *U.S. v. Route 7, Box 7091, Chatsworth, Ga.*, 1997 U.S. Dist. LEXIS 10333 (N.D. Ga. April 4, 1997)).

[198] *In re Gleasman*, 111 B.R. 595, 603-04 (Bankr. W.D. Tex 1990) (emphasis in original).

upon the issuance of a Final Appellate Decision. The only possible adverse consequence of significance to the Debtor, during the time period of the stay, is reversal of the Confirmation Order. If that occurs, the only "loss" suffered would simply be the "natural result of any ordinary appeal -- one side goes away disappointed."[199] And that is a "loss" *not* protected by the posting of a bond.

97. Further, imposition of the Limited Stay would create no additional risk, during the time period of that stay, of diminution in the value of the Licenses. Accordingly, there is no diminution in property value to protect with a bond here.[200]

98. Based on the above, SkyTel requests this Court to grant SkyTel's Motion and impose the Limited Stay without bond.

***b. Alternatively, only a very limited bond should be required***

99. SkyTel contends that no bond should be required under the circumstances involved here, as discussed above. Alternatively, if this Court nevertheless decides to require a bond, the bond should be very limited in light of the very limited number of even *possible* payments to third parties which would or could be stayed by the terms of the Limited Stay (i.e., any payments to be made under and pursuant to the terms of the Plan and Confirmation Order prior to FCC approval of the assignment of the Licenses, other than those payment expressly excluded from the scope of the requested Limited Stay).

100. Indeed, based on SkyTel's reading of the Plan and Confirmation Order and the facts known to date, the only amounts a bond may even arguably need to take into consideration are:

---

[199] *In re Pac. Lumber*, 584 F.3d 229, 244.

[200] *See In re Sphere Holding Corp.*, 162 B.R. at 644-45 (Bond not needed where no risk collateral will decline in value).

(A) amounts associated with any interest that would accrue in connection with any payments that may be stayed under Limited Stay Item (i) -- i.e., "Payments of Class 8 Administrative Claims . . . , but excluding properly approved payments (administrative or otherwise) to: (a) Bankruptcy Professionals; (b) parties to the Confirmation Order and Confirmation Order Appeal who are before the Court (including those parties' attorneys); and (c) the Liquidating Agent;"[201]

(B) amounts associated with any loss that may be caused by any stay of payments of ad valorem taxes under Limited Stay Item (j) -- i.e., "Payments called for under the Plan in connection with Class 6 Priority Tax Claims;"[202] and

(C) amounts associated with any interest that would accrue in connection with any payments that may be stayed under Limited Stay Item (l) -- i.e., "The payment of any cure amounts in connection with asset purchase agreements (or other executory contracts or unexpired leases) assumed, or assumed and assigned, pursuant to the Plan or pursuant to orders entered prior to Plan confirmation, but excluding (a) any such payments which can only be made *after* the FCC has approved the underlying transaction and after such underlying transaction has been consummated, and (b) any such properly approved payments to parties to the Confirmation Order and Confirmation Order Appeal who are before the Court (including those parties' attorneys)."[203]

(i) Class 8 Administrative Expense Claims

101. Regarding (A) above (dealing with payments of certain Class 8 Administrative Claims), with one possible minor exception, no party has to date sought approval of any payment which would be stayed under Limited Stay Item (i). And the possible "minor exception" involves a completely meritless assertion of a right to such a payment.[204] Accordingly, it is not possible at this time to determine what, if any, interest would accrue in connection with any such hypothetical stayed payments.

102. Further, it appears, at least from certain provisions of the Plan, that it does not even properly provide for any payments which would be stayed under Item (i). Specifically, the Plan provides that, upon confirmation, Choctaw "shall pay to the Administrative Expense

[201] *See supra*, at p. 6; *see Plains Farm Supply v. Tex. Equip. Co. (In re Tex. Equip. Co.)*, 283 B.R. 222 (Bankr. N.D. Tex. 2002).
[202] *See supra*, at p. 7; *see In re Tex. Equip. Co.*, 283 B.R. 222.
[203] *See supra*, at p. 7.
[204] *See e.g.* Dkt. #s 1006, 1038, 1039.

Claimants the allowed amount of their expenses, up to their share of the Administrative Expense Pre-Payment, and a payment of $250,000 to be used *by the Administrative Expense Claimants* to pay a pro-rata portion of the administrative fees, as allowed by the court."[205] The Administrative Expense Claimants are defined solely to include counsel for the Debtor and the Committee.[206] Additionally, the Liquidating Agent is to be paid an initial $10,000 upon confirmation.[207] Such payments to the Debtor and Committee counsel, and to the Liquidating Agent, are not stayed by the Limited Stay. The Plan arguably does not provide for any other administrative expense claims to be paid, if *ever*, until the FCC approves the transfer of the Licenses to Choctaw.[208] Under the terms of the Limited Stay, any such post-approval payments, if any, are likewise not stayed.

103. Nevertheless, due to some ambiguity in the Plan, there is a possibility and a risk that parties may seek approval of payments which would fall under the scope of the stay requested in Limited Stay Item (i). By way of example only, the Plan does in at least one place describe Class 8 more broadly as being comprised of "Administrative Expense claims including [and thus arguably not limited to] professionals,"[209] and in another place indicates that the aforementioned $250,000 will be put towards "Allowed Administrative Expense Claims"[210] (as opposed to being limited to use by the "Administrative Expense Claimants" defined as the Debtor and Committee counsel).[211]

---

[205] *See* Plan, Dkt. #669, at p. 10 (emphasis added).
[206] *See* Plan, Dkt. #699, at p. 2.
[207] *See* Plan, Dkt. #669, at p. 13.
[208] *See e.g.* Plan, Dkt. #669, at p. 12.
[209] *See* Plan, Dkt. #669, at p. 9.
[210] *See* Plan, Dkt. #669, at p. 12.
[211] Further, regardless of the terms of the Plan, the Confirmation Order provides for payment, or the possibility of payment, of certain other administrative claims (specifically -- to Atlas Pipeline Mid-Continent, LLC; Denton County Electric Cooperative, Inc. d/b/a CoServ Electric; and Crown Castle South, LLC). But, such payments are excluded from the scope of the stay requested in Limited Stay Item

(ii) Class 6 Priority Tax Claims (Ad Valorem Taxes)

104. Regarding (B) above (dealing with payments of ad valorem taxes), the Plan provides that the Debtor "is liable to various taxing authorities for ad valorem property taxes," and that such "Class 6 Priority Tax Claims" shall be paid by Choctaw annually over three (3) years with the first payment due a year after the Effective Date.[212] Under the Plan and Confirmation Order, one of the general conditions precedent to the occurrence of the Effective Date is FCC approval of the transfer of the Licenses to Choctaw.[213] Based on the foregoing, no Class 6 Priority Tax Claims are to be paid during the pendency of the requested Limited Stay, given that it would expire upon FCC approval of the assignment of the Licenses.

105. Nevertheless, there is at least a possibility that the Debtor could ultimately seek to pay such claims prior to FCC approval of the transfer of the Licenses to Choctaw, given that the Plan and Confirmation Order also provide, in connection with the Effective Date, that certain of the conditions precedent to its occurrence could possibly be waived, particularly if that would not have "a material adverse effect on . . . Choctaw . . . ."[214] Whether or not this might happen is an unknown at this point, but the possibility of it happening is the reason SkyTel has included Item (j) in its requested Limited Stay. In any event, no such payments could be made under the terms of the Plan and Confirmation Order until at least a year after the Effective Date.[215]

106. For the above reasons, it is difficult or not impossible to determine what, if any, amounts may ultimately be associated with loss caused by a stay of payments of ad valorem taxes under Limited Stay Item (j). As such, SkyTel requests the Court to exercise its discretion

---

(i), because those parties are parties to the Confirmation Order and Appeal. *See e.g.* Confirmation Order, Dkt. #980, at pp. 5-6, 12-13.

[212] *See* Plan, Dkt. #669, at p. 11 (emphasis added).

[213] *See* Plan, Dkt. #669, at p. 24; *see also* Confirmation Order, at p. 7.

[214] *See* Plan, Dkt. #669, at p. 24; *see also* Confirmation Order, at p. 7.

[215] And the Effective Date cannot occur regardless until after the Debtor has filed a Notice of Effective Date. *See* Third Amended Disclosure Statement, Dkt. #668, at p. 23; Plan, Dkt. #669, at p. 4.

not to impose a bond in connection with this item, or, alternatively, to impose a very limited bond at this time.

107. Should the Court decide to impose a limited bond, SkyTel would note that, according to the Third Amended Disclosure Statement, various taxing authorities have filed secured claims in the amount of $77,929.77.[216] Further, as to the ad valorem taxes, one court within the Fifth Circuit has noted that a "bond need not cover ad valorem taxes for previous years."[217] Instead, *the bond need only cover "penalties which continue to accrue on past due ad valorem taxes" and ad valorem taxes withheld for the years pending the appeal*.[218]

(iii) Cure Amounts

108. Regarding (C) above (dealing with payments of certain cure amounts – hereinafter, the "Cure Payments" or "Cure Amounts"), the Plan provides that:

> Any monetary amounts by which each Executory Contract and unexpired lease to be assumed pursuant to the Plan is in default shall be satisfied, pursuant to § 365(b)(1) of the Bankruptcy Code, by payment of the amount necessary to cure such default in Cash on the Effective Date or on such other terms as the parties to each such Executory Contract may otherwise agree. In the event non-debtor parties to executory contracts do not file *and* assert their cure costs, the cure costs *will be assumed to be zero*.[219]

109. As of this date, the Court has retained jurisdiction in various Orders (the "Assumption Orders")[220] in connection with determining the reasonableness and allowability of any Cure Amounts that may be, but have not yet been, filed and asserted by, among possible others, the following non-Debtor parties in connection with assumed executory contracts and/or

---

[216] *See* Third Amended Disclosure Statement, Dkt. #668 p. 17.
[217] *See In re Tex. Equip. Co.*, 283 B.R. at 230.
[218] *Id*.
[219] *See* Plan, Dkt. #669, at p. 23 (emphasis added).
[220] The Assumption Orders are expressly recognized and preserved in the Confirmation Order. *See* Confirmation Order, Dkt. #980, at p. 11.

unexpired leases -- (a) Questar Market Resources, Inc.;[221] (b) Shenandoah Valley Electric Cooperative;[222] (c) Jackson County Rural Electric Membership Cooperative;[223] (d) DuQuesne Light Company;[224] (e) Encana Oil & Gas (USA) Inc.;[225] and (f) Puget Sound Energy, Inc.[226] However, because the associated Cure Amounts have been reserved by the Court, but not yet filed and asserted, let alone liquidated, the Court should assume the amounts "to be zero" consistent with the Plan. Accordingly, no bond should be required in connection with Limited Stay Item (l) and any hypothetical payment of such undetermined amounts.

110. Notwithstanding the above, and the express terms of the Assumption Orders, the Plan also provides that the following two Cure Amounts have been "asserted and/or filed by non-debtor parties to executory contracts," and that the subject Cure Amounts are "known to the Debtor" -- (a) a Cure Amount of $43,273.76 by Jackson County Rural Electric Membership Cooperative; and (b) a Cure Amount of $50,290.65 by Encana Oil & Gas (USA) Inc.[227] The Court, however, has yet to approve these amounts, and no application has been made to the Court requesting it to do so. Nevertheless, to the extent that these Cure Amounts: (i) may eventually be approved by the Court upon a proper request; (ii) are to be paid prior to FCC approval of the assignment of the Licenses; (iii) are to be paid prior to the time the FCC has approved the underlying transaction and that transaction has been consummated; and (iv) are to be paid to parties *not* party to the Confirmation Order and Appeal (i.e., to the extent payment of these Cure Amounts fall under Limited Stay Item (l)), then the bond -- if any is required to implement the

[221] *See* Order (Questar Market Resources, Inc.), Dkt. #769, at p. 3, ¶ 7.
[222] *See* Order (Shenandoah Valley Electric Cooperative), Dkt. #767, at p. 3, ¶ 8.
[223] *See* Order (Jackson County Rural Electric Membership Cooperative), Dkt. #770, at p. 3, ¶ 7.
[224] *See* Order (DuQuesne Light Company), Dkt. # 773, at p. 3, ¶ 8.
[225] *See* Order (Encana Oil & Gas (USA) Inc.), Dkt. #772 at p. 3, ¶ 8.
[226] *See* Order (Puget Sound Energy, Inc.), Dkt. #386 at p. 3, ¶ 7.
[227] *See* Plan, Dkt. #669, at p. 23.

limited stay in this regard -- should be limited to an amount sufficient to cover the interest that would accrue on the withheld payments during the pendency of the Limited Stay.

111. The following Cure Amounts have been asserted by non-Debtor parties in connection with assumed executory contracts and/or unexpired leases, and have also, unlike those above, actually been approved by the Court in amounts certain -- (a) a Cure Amount of $108,738.45 by Enbridge, Inc. ("Enbridge");[228] (b) a Cure Amount of $116,021.95 by Dixie Electric Membership Corporation ("Demco");[229] and (c) a Cure Amount of $487,778.28 by Southern California Regional Rail Authority ("SCRRA").[230] However, the Orders approving these Cure Amounts provide that the amounts can only be paid, if ever, after "the license transfer[s] contemplated by the [underlying] Motion[s] . . . . obtain[ ] all necessary regulatory approval[s] from the [FCC] and the transfer[s] [are] in fact consummated . . . ."[231] The practical effect of these limitations on the timing of such payments is that the payments could very likely not be made, if ever, until after the Limited Stay expires. And, in any event, any such payments are excluded by the express terms of Limited Stay Item (l) and thus do not justify any bond.

112. Finally, no bond should be required in connection with properly approved Cure Payments to the following, given that Limited Stay Item (l) does not apply to parties to the Confirmation Order and Appeal such as these -- (a) Atlas Pipeline Mid-Continent, LLC; (b)

[228] *See* Plan, Dkt. #669, at p. 23; *see* Order (Enbridge, Inc.), Dkt. #771, at p. 2, ¶ 6, and at p. 1 n. 1; *see* Order on Supplemental Motion to Approve Proposed Cure Payment Under Assumed Asset Purchase Agreement with Enbridge, Dkt. #524.

[229] *See* Plan, Dkt. #669, at p. 23; *see* Order (Dixie Electric Membership Corporation), Dkt. #774, at p. 2, ¶ 6, and at p. 1 n. 1; *see* Order on Supplemental Motion to Approve Proposed Cure Payment Under Assumed Asset Purchase Agreement with Demco, Dkt. #523.

[230] *See* Order (SCRRA), Dkt. #768 at p. 2, ¶ 6; *see* Order Granting Motion to Approve Proposed Cure Payment under Assumed Asset Purchase Agreement with SCRRA, Dkt. #954, at p. 2, ¶ 7.

[231] *See e.g.* Order on Supplemental Motion to Approve Proposed Cure Payment Under Assumed Asset Purchase Agreement with Enbridge, Dkt. # 524 at p. 2, ¶ 6.

Denton County Electric Cooperative, Inc. d/b/a CoServ Electric; and (c) Crown Castle South, LLC.

(iv) Remaining Amounts

113. The remaining payments called for under the Plan, will *not* be made, if ever, until *after* FCC approval of the assignment of the Licenses and the final closing of approved APAs and/or other License sales.[232]

**CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, SkyTel respectfully requests that this Court grant SkyTel's Motion and issue the Limited Stay requested herein, without bond, pending SkyTel's Appeal. In the alternative, should the Court determine that a bond is necessary, SkyTel respectfully requests that the bond amount be limited as set forth above. SkyTel further prays for general relief.

**THIS** the 18th day of March, 2013.

Respectfully submitted,

**WARREN HAVENS, SKYBRIDGE SPECTRUM FOUNDATION, VERDE SYSTEMS LLC, ENVIRONMENTAL LLC, INTELLIGENT TRANSPORTATION & MONITORING LLC, and TELESAURUS HOLDINGS GB LLC**

By: /s/ William H. Leech
William H. Leech, MBN 1175
Danny E. Ruhl, MBN 101576
Timothy J. Anzenberger, MBN 103854
Three of Their Attorneys

[232] *See e.g.* Plan, Dkt. #669, at pp. 9-13.

OF COUNSEL:
**COPELAND, COOK, TAYLOR & BUSH, P.A.**
600 Concourse, Suite 100
1076 Highland Colony Parkway (Zip—39157)
P.O. Box 6020
Ridgeland, MS 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-7626
bleech@cctb.com
druhl@cctb.com
tanzenberger@cctb.com

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing to be filed via the Court's Electronic Case Filing System, which caused a copy to be served on all counsel and parties of record who have consented to receive ECF notification, including the following:

Craig M. Geno
cmgeno@cmgenolaw.com

Bradley T. Golmon
bgolmon@holcombdunbar.com

Douglas C. Noble
dnoble@mmqlaw.com

Jim F. Spencer, Jr.
jspencer@watkinseager.com

Derek F. Meek
dmeek@burr.com

James A. McCullough, II, Esq.
jmccullough@brunini.com

John P. Dillman
houston_bankruptcy@lgbs.com

D. Andrew Phillips
aphillips@mitchellmcnutt.com

R. Spencer Clift
sclift@bakerdonelson.com

Richard H. Drew
Richard.H.Drew@usdoj.gov

Stephen W. Rosenblatt
steve.rosenblatt@butlersnow.com

United States Trustee
USTPRegion05.AB.ECF@usdoj.gov
Sammye.S.Tharp@usdoj.gov

Michael A. Crawford, Esq.
mike.crawford@taylorporter.com

I further certify that I have caused the foregoing to be served on the following via first class U.S. Mail, postage prepaid:

Timothy Lupinacci, Esq.
Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C.
1400 Wells Fargo Tower
420 20th Street North
Birmingham, Alabama 35203

Shenandoah Valley Electric Cooperative
c/o John Coffey
147 Dinkel Avenue
Mt. Crawford, VA 22841

Questar Market Resources, Inc.
c/o M.L. Owen
P.O. Box 45601
Salt Lake City, Utah 84145-0601

Jackson County Rural Electric Membership Corporation
c/o Andrew Wright, P.C.
P.O. Box 342
Salem, IN 47167-0342

Encana Oil & Gas (USA) Inc.
c/o Alven Frazier
SCADA Automation Lead
306 Hwy 380
Bridgeport, TX 76426

DuQuesne Light Co.
c/o Mark Sprock
Manager, Communications
411 Seventh Ave; Mail Drop 8-5
Pittsburg, PA 15219

Puget Sound Energy, Inc.
c/o Steven R. Secrist and Margaret Hopkins
10885 NE 4th Street
Bellevue, WA 98009-9734

Bill D. Bensinger
Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C.
1400 Wells Fargo Tower
420 20th Street North

Birmingham, Alabama 35203

C. Chris Dupree
2660 Montgomery Highway
Dothan, AL 36303-2618

Critical RF, Inc.
c/o Donald R. DePriest and Tim Smith
1601 Greentree Court, Suite C
Clarksville, IN 47129

**THIS** the 18th day of March, 2013.

/s/ William H. Leech
Of Counsel